

BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC265

ORIGINAL

**IN THE MATTER** of an appeal under Clause 14 of the First  
Schedule of the Resource Management  
Act 1991 (**the Act**)

**BETWEEN** OMAHA PARK LIMITED  
(ENV-2007-AKL-000210)  
Appellant

**AND** RODNEY DISTRICT COUNCIL  
Respondent

Hearing: At Auckland  
15<sup>th</sup> – 19<sup>th</sup> February 2010  
22<sup>nd</sup> – 26<sup>th</sup> February 2010  
8<sup>th</sup> – 10<sup>th</sup> March 2010

Court: Environment Judge J A Smith  
Environment Commissioner P A Catchpole  
Environment Commissioner D J Bunting

Appearances: A M B Green and J D Young for Omaha Park Limited (**Omaha Park**)  
W S Loutit and B S Carruthers and S A Carnachan for Rodney District Council (**the District Council**)  
R B Brabant and J C Brabant for Omaha Beach Community Incorporated, Mitchell and Abraham Family Trusts (**the Residents**)  
S J Berry and C D H Malone for Auckland Regional Council (**the Regional Council**)  
B I J Cowper, J C Campbell, and B A Watts for Ching Family Trust  
D J Sadlier for Tunnicliffe Family Trust  
Anderson & Lett - Section 274 party (withdrawn)

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DECISION ON APPEAL

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The relevant provisions of the Rodney District Plan are confirmed.



- B. The appeal is disallowed.
- C. Any applications for costs (which are not encouraged) are to be filed within 20 working days, replies 10 working days thereafter, and final replies (if any) 5 working days thereafter.

## REASONS FOR DECISION

### Introduction

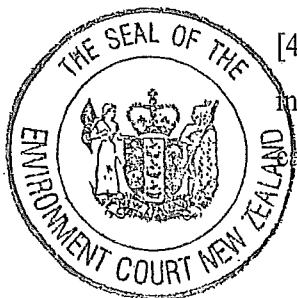
[1] Omaha Park Limited seek a special zone for some 650ha of land they own or control south of Omaha Beach settlement on the Tawharanui peninsula. This land is currently zoned in the Rodney District Proposed Plan (**the Proposed Plan**) as part of the East Coast Rural Zone (**ECRZ**). Of particular interest is some 95ha of land commencing just south of the Omaha Beach residential area which rises from the sandspit to the range of hills that form the Tawharanui peninsula. This area was described in the hearing as **Seaview Village**.

[2] A ridge spur runs to the coast before falling to the south to Tawharanui Regional Park. These slopes are partially covered with radiata forestry in relatively poor condition. Behind this is a complex hill and ridge structure encompassing an area known as Hubbards Bush containing native vegetation with kauri on the ridges. Further inland towards Takatu Road the peninsula forms an undulating plateau which is currently in farmland.

[3] The appellant seeks to achieve a greater intensity of development and more liberal activity status over the land outside the Seaview Village area while it remains rural. Within Seaview Village itself it is intended that the area be high density Urban. Within the Urban and Rural areas there is intended to be extensive protection of vegetation, revegetation, access and other arrangements to constitute a comprehensive development proposal over the entire area.

### Omaha Beach and the Seaview Village area

[4] We should briefly describe this area as it has been the subject of intense interest over the last few decades. The existing Omaha Beach area is accessed by a causeway/bridge access across from Omaha Flats through the head of Whangateau



Harbour. To the north of this road is the original area of Omaha Beach. To the south of the access road is Omaha South which has been the subject of a recent zoning now incorporated within the Rodney District Council Proposed Plan. This occupies the balance of the spit and terminates at its southern end adjacent to the headland known as Te Kie Point on the oceanside and with wetlands connecting from the base of the headland on the east to the west where it connects with existing land owned by the District Council containing a former quarry. On the Whangateau Harbour side the urban area is bounded by Kahikatea Forest which forms the western margin of Omaha South and the western side of the spit.

[5] Immediately south of the southern end of Omaha South, the low-lying land of Seaview Village constitutes colluvial and alluvial deposits from the hills behind sitting over volcanic rock. This forms a natural amphitheatre formed by Te Kie Point and the hill ridge from near the coast near to the Whangateau Harbour. Nevertheless, at both ends there are lower saddles giving coastal access via a small beach at the eastern side and access through to Whangateau Harbour via a small stream that flows from the wetland area to the west.

[6] These features are more properly described in the map annexed hereto and marked A, and superimposed over this is the area sought for Seaview Village consisting an area marked 4v and 4e. In broad terms it is intended that the area 4v be available for medium to high intensity housing, with the area 4e constituting areas for revegetation and greenbelt.

[7] Nevertheless, it is important to note that there are several other properties which would remain as ECRZ situated in this area, including the Mitchell and Tunnicliffe properties in the centre of the amphitheatre; the Abraham property to the upper southeast and the Ching Family Trust property to the east. In addition to this is an existing farmhouse which would be situated within the area marked 4e and is clearly visible in views from Omaha South. It is also noted that there are several properties which have been subdivided in this group but are now owned or controlled by Omaha Park and would not be subject to further development.



[8] Given that Seaview Village would be a comprehensive development, there would be extensive rehabilitation and preservation of other areas of the wider property, including importantly the significant natural area of Hubbards Bush.

[9] The total area of land within the titles described in the cadastral plan attached as **B** within the Seaview Village basin is some 155ha of which the appellant controls directly or indirectly Areas C, E, D1, D2, E, H, to an area of some 96ha. There are 10 titles currently covering the Seaview basin with Areas O, I, L, M, J owned by other parties and comprising around 59ha making a total of over 150ha.

[10] Importantly, this 59ha is not subject to the rezoning appeal and will remain East Coast Rural. Of the remaining 96ha some 70ha was sought to be covered by an urban zoning but the fate of the balance was unclear. There are only 4 titles covering the balance of land. Areas B1 and B2 (access road) are around 260ha in area and include a large area of native bush (Hubbards Bush) of over 100ha.

[11] Area A is 234ha and contains most of the land currently farmed but have areas of native bush of varying quality. Areas F1 and F2 appear as part of the farm with A, and fronts Takatu Road. There are some existing houses and farm buildings and the frontage is well developed to the west and east of F. Areas F1 and F2 exceed 60ha and A, B and F together exceed 550ha.

[12] What can also be seen from the cadastral plan is that some of the adjacent properties on Takatu Road have utilised provisions of the Proposed Plan enabling the construction of residences while preserving and protecting areas of native bush. To the West beyond the peninsula are the areas towards Matakana and Omaha Flats. These areas again reflect significant pressure for residential land.

### **The Issues**

[13] The key question for this Court is the use to be put to the land forming the basin we describe as **Seaview Village**. But a wider question is the appropriate usage of the balance of this large site, especially given the existence of a significant area of Hubbards bush which adjoins the Tawharanui Regional Park.



[14] Nevertheless, it is important to note that the key issue that was raised in this case is the rezoning of Area H (part Lot 1DP334670) and part Area E (part Lot 8DP7207879) as Urban land. As we have already noted, some of the wider site would remain East Coast Rural including the Ching property Area O, Abraham property Area I and Mitchell & Tunnicliffe property (L and M). Annexed and marked C is a map of the Seaview Village area. *Policy Area 4v* is intended as Urban Residential.

[15] In a broad sense, this case also raises the following questions:

- [a] The certainty of outcomes as proposed under the current zoning of the East Coast Rural Zone (ECRZ) versus the special provisions;
- [b] The question of defensible Urban boundaries, particularly the existing wetland boundary demarcating the move from the distal spit sands of Omaha Beach to the colluvial surfaces over volcanic rock in the Seaview Village area, or whether a better defensible boundary would be the escarpment above Omaha Beach;
- [c] The extent of risk that is appropriate and acceptable under the Act, given that it is not a risk-free statute; and
- [d] The extent to which (if at all) the requirement for other regional resource consents for infrastructural requirements, particularly wastewater and water quality discharges, should influence the Court in considering this plan change

### **The Overall Principle**

[16] The Court will address in significantly greater detail the various aspects of this matter giving rise to its conclusion. Nevertheless, it is appropriate to say at the outset that the key issue of principle here is whether or not the Seaview Village area is appropriate for further *urban* development. For the reasons that are set out in significantly greater detail through the balance of this decision, we have concluded that the Seaview village area is not appropriate for urban development.



[17] We conclude that this area should properly constitute a reinforcement of the boundary between the urban and rural zones currently supported by the Council wetland reserves. We have concluded that the potential to reinforce the escarpment as a defensible urban boundary is flawed for a number of reasons, including:

- [a] The difficulty of maintaining building heights at sufficiently low level to ensure the urban boundary is at all times clear;
- [b] The existing fragmentation of such a boundary by the subdivided lots with buildings already constructed upon them including the Ching, Abraham, Mitchell, Tunnicliffe sites and the existing farmhouse on the ridge belonging to Omaha Park;
- [c] The fragmentation of the area by existing and proposed roads; and
- [d] The topography is not in itself sufficiently strong to make such a demarcation, particularly given that the western end of the basin meets the Whangateau Harbour and that buildings will be proposed to be constructed to nearly the top of the ridge in that position around the 30RL contour. There is also a further saddle in the ridge towards the eastern side, which although not as marked as that of the western end, nevertheless would connect with the existing Abraham property and the road beyond to visually breach any such boundary.

[18] In the end we have reached the conclusion as a value judgment based upon the evidence, the law, and the Court's own experience that the provision of this land as urban land would be inappropriate and that the better zoning for this land would be ECRZ. Given that this would be consistent with existing properties for which no rezoning was sought i.e. Ching, Mitchell, Tunnicliffe, Abraham, and the Smith & Hardy properties, we conclude that the ECRZ is better. The current explanation as to the decision in principle must be considered in the context of the significantly more detailed explanation we give for our conclusion later in this decision.

[19] We will also discuss a number of legal issues which were raised, which may in themselves constitute a bar to the merits-based evaluation we have just summarized.



For the reasons we will give, the conclusions which were reached in respect of the balance of the area (other than Seaview Village) are essentially consequential upon that core normative decision. As Mr Green put the matter for his client in closing<sup>1</sup>:

... it is not open to the Court to decline the Seaview Village but approve the remaining Policy Areas ... A decision that reduces the development potential below the ECRZ opportunity is not "somewhere in between" the Council's notified District Plan and the decision requested by OPL.

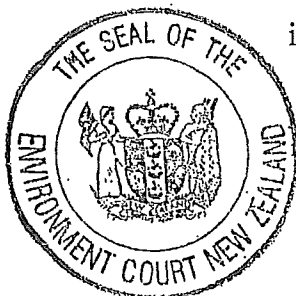
[20] It is not possible for this Court to tell which of the provisions relating to other areas are intended to be solely compensatory for the Seaview Village (i.e Hubbards Bush). We have therefore concluded that the appropriate position on balance is to refuse the entire Plan Change even though some aspects of it were not contentious before the Court (i.e the protection of the indigenous native vegetation). We keep in mind, as Mr Green tells us, that it is necessary to look at the *entire package* when reaching that conclusion, and we do this in detail later in this decision.

[21] Given that our core conclusion is that the total area should remain rural, it then follows that Seaview Village as an urban area is likely to be inconsistent with both the relevant regional and district documents and that of the options before us, ECRZ is the better zoning. Nevertheless, this would do an injustice to the subtleties of this case which we now go on to discuss in significantly greater detail.

### The Proposal

[22] In order to understand the proposal in greater detail, reference should be made to Appendix C. This shows the various special sub-zones sought for the site. *Policy Area 1* shows various forms of conservation area, although it is proposed that there be some trickle irrigation of wastewater after treatment through some of the *Policy Area 1e*. *Policy Area 2* is intended for water catchment and storage from a major dam, and also for a wastewater treatment plant. *Policy Area 4e* is on the upper slopes of the Seaview Village basin and is intended to be environmental enhancement planting.

[23] When we come to development areas it can be seen that *Policy Area 2rl* is intended to be rural lifestyle, very similar in its approach to that of the Countryside



See paragraph [11.1] of Closing Submissions, AMB Green

Living, but noting that there is significant environmental enhancement provided by the conservation areas under *Policy Area 1*.

[24] *Policy Area 2rl* represents rural living comprising farmland accessed from Takatu Road. Unusual in this regard is the small *Policy Area 2rl* next to the Ching property situated on the western side of Te Kie Point. This is an isolated area, and essentially the zoning appears to be to provide for another home or two homes in that area.

[25] *Policy Area 3* is intended to recognise Te Kie Point, but does provide for a Café/Interpretation area to be provided on the lower slopes overlooking the Omaha south settlement. Evidence of vegetative screening was unclear.

[26] *Policy Area 4v* of some 37.3ha is the critical Seaview Village area in question that we have previously discussed. It is situated on the lower slopes of the basin area, although in some positions (e.g. on the west) it approaches the top of the ridge line as it does in the position close to the Abraham property. It abuts the Smith & Hardy land which is zoned ECRZ on the western side, council reserve land being the wetland land in the central area, and further areas of ECRZ being the Mitchell and Tunnicliffe blocks in the centre and the Ching and Abraham properties on the eastern side.

[27] *Policy Area 5* is within the current area of pine forestry. It is intended to provide a form of cluster housing within this area. Originally there had been a suggestion of a golf course, although the witnesses seem to agree that it was most unlikely that one would be constructed given the high quality of the Omaha Golf Course and the cost of designing and building a quality golf course. There is little detail about how this cluster housing and access would be constructed so as to avoid the ephemeral streams through the area, but there was evidence and discussion in relation to completely screening any cluster housing from views from Tawharanui Regional Park. We should say that there are already four houses within the site on the coastal edge at Pukenihihi Point, one of which (the Hauser house) is very large and clearly visible from many places within the Regional Park.

[28] Finally, the applicant proposed a small area (*Policy Area 6*) for the construction of visitor lodge accommodation for up to 35 units, associated café,





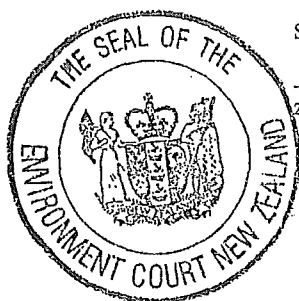
meeting areas, administration building and the like. We will discuss the details of that in due course. As can be seen, it is immediately adjacent to a *Policy Area 1e* which recognises a strip of rare coastal forest immediately in front of *Policy Area 6*. That area, to and including Pukenihi Point, also became relevant in respect of cultural matters given an historic battle was fought in this general area making this area important to local iwi.

[29] Finally, in respect of Appendix C, we should particularly note that a number of walkways are shown on this attachment. When witnesses were queried on these walkways we were advised that these were indicative only and do not appear to have undergone any detailed consideration. Importantly, there are no walkways shown along the coastal areas, notwithstanding that even the witnesses for the applicant acknowledged that this was a matter which must be recognised and provided for under Section 6(d) of the Act, particularly having regard to the Regional Park to the east and Omaha settlement to the west. Also, issues of public access from the quarry around the edges of Whangateau Harbour are relevant, although not discussed by witnesses in any detail. Although not clear from Appendix C, we should note that *Policy Areas 4e* and *4v* about the Ching and Abraham properties with areas that were considered for enhancement planting by the Court and Council in the *Di Andre*<sup>2</sup> and Robertson<sup>3</sup> resource consents.

### Revegetation Approach

[30] The Court's approach in *Di Andre* allowed for further residential development on the basis of a significant enhancement of indigenous vegetation by replanting large areas within the total area subdivided. This approach has subsequently been approved in *Auckland Regional Council v Arrigato*<sup>4</sup> and a number of other decisions. As a result it has been picked up in the Proposed Plan and is now a key basis upon which rural subdivisions may occur. Examples are shown in Attachment B which are accessed off Takatu Road. Importantly, the Seaview Village proposal intends to preserve all of the Di Andre plantings where the consent was relied upon by the subdivider and subdivision has occurred in accordance with the consent. These

<sup>2</sup> *Di Andre Estates Limited v Rodney District Council*, W187/96 and W36/97  
Robertson Family Trustees Consent 26373, 9 June 2000  
[2001] NZRMA 481(CA)



plantings are on the upper slopes, with the exception of some of the plantings on the Ching property which are in the lower-lying area in a saddle between the coast and the area now identified as *Policy Area 4v*.

[31] In respect of the Di Andre consent, only two of the lots appear to have been constructed on; the Ching and Abraham lots. Lot 3 is now controlled by Omaha Park and has a significant amount of coastal planting. This includes a large gully clearly visible from the sea and now presenting as an attractive and well-planted mix of native species. The planting on the Ching property is extensive and is largely in good condition. The planting on the Abraham property is perhaps less obvious because it forms a backdrop to the existing dwelling. Nevertheless, that again appears to be in good condition. The planting on Lot 1 is extensive and although not quite to the standard of other areas (e.g the Ching property), it has substantial canopy closure with a mix of species. Adjacent to the Di Andre subdivision are the Mitchell and Tunnicliffe properties, both of about 3.5ha, which have as their backdrop a significant area of mature native bush in good condition. This appears to be providing a seed source for the replanted areas nearby and nearly connects with another area of vegetation to the west and over the ridge.

[32] Below the Di Andre plantings, the Robertson Family Trust property obtained a resource consent for subdivision which was never utilised. This 6-lot subdivision included two lots on Te Kie Point (one nearly on the pa) and the others within the area identified as *Policy Area 4v* under the Omaha Park proposal. Planting was required in accordance with that consent. The consent was never operated upon and the subdivision did not occur. Nevertheless, most of the planting required by that consent occurred and still survives. In particular, there has been extensive planting between the existing wetland and the Ching boundary.

#### Value of Revegetation

[33] Dr Clunie gave evidence for the applicant and seemed to be including within his assessment of the character of the area the wetland planting which occurs slightly to the east of *Policy Area 4v*. It may be that Dr Clunie was only discussing the plantings within the *Policy Area 4v* and not those within the wider area of *Policy Area*

4e.



[34] It is clear to us from overhead photographs and a site visit that there are substantial wetland species through the northeastern portion of *Policy Area 4v* and this continues into *Policy Area 4e* between Te Kie Point and the Ching boundary. The vegetation is native and extensive. We conclude on the basis of the evidence we have been given and our site observation that it is to a good standard and represents a good range of species. It certainly presents in photographs and on our site visit as representing a diverse wetland community. We noted a number of bird species in the area. We agree with the ecologist called for the District Council that this area is in good condition, likely to be self-regenerating and provides a habitat for native and exotic fauna.

[35] As we move from this northeastern wetland along the road to the west, the vegetation continues in good condition and there are areas where there is manuka vegetation on the uphill (south) side of the road within the *4v* area (to be developed). Although we can understand Dr Clunie's criticism of this manuka as a monoculture, we do not reach the same conclusions as to its value. Manuka is clearly indigenous vegetation endemic to this area. Its vigorous colonisation of this area demonstrates that it is appropriately suited to these uphill colluvial slopes as an early coloniser. We do not agree with Dr Clunie that it will continue as a monoculture, although we do agree that there is Woolley Nightshade through it. There are clear examples of other species beginning to re-populate the undergrowth through natural seeding. We anticipate that this process will accelerate as the manuka becomes higher and leaves more space for sunlight to penetrate and for bird perches. Nevertheless, it is already of a good standard, at some 3m – 4m plus in height, and represents a natural and attractive native vegetative cover to the area.

[36] In some other areas of open pasture, we noted that there were native species naturally colonising the area. It appears to us that the removal of stock may lead to the area regenerating a natural cover in fairly short order. With some weed control and selective planting of species, we are in no doubt that the area could naturally revegetate in the absence of stock.

[37] Near the road entrance to the west of *Policy Area 4v*, there is also an area of further exotic planting which is well-established. This was disregarded by all of the ecologists, but from our perspective, it did form an attractive vegetative backdrop to



the wetland area to its immediate north. We would expect it to be succeeded by indigenous species in due course, but it does contribute to the existing amenity values of the area.

[38] As we understand it, most of the vegetation within *Policy Area 4v* is to be removed. Some remnants may be retained where they fit within natural corridors or water paths. Varying figures for areas of removal were given and it may be that some of the wetland species would be spared in the northeastern corner as they might form part of the riparian areas to the large pond intended.

[39] In all we were advised that some 24ha of new plantings would occur within *Policy Area 4e* and there will be approximately 12ha of existing planting removed within *Policy Area 4v*. In our view, the areas cannot be compared on a strict area basis for the following reasons:

- [a] The plantings from the wetland to the top of the ridge form an ecotone which constitutes a habitat with changing vegetation species. The vegetation at the top of the ridge envisaged under *Policy Area 4e* would not be physically connected with the wetland area unless some special treatment is anticipated in the vicinity of the Ching property at the eastern side;
- [b] The existing vegetation in *Policy Area 4v* is well-established (particularly in the wetland area) and is largely manuka monoculture in excess of 3m high and is dense and in good condition. We noted that there are other species within it, we assume dispersed by seed drop from other areas;
- [c] The question of the responsibility for and maintenance of the new vegetation in Area 4e is a matter that was not clarified to our satisfaction during the hearing. There is no doubt that the cost of maintaining and bringing the new vegetation up to an appropriate standard is likely to be significant.



[d] The vegetation to be provided above Seaview Village on the ridge, although visible from Omaha Beach, will not reinforce the wetland area which provides significant amenity at the southern end of Omaha Beach. We acknowledge that it will reinforce the vegetation on the Takatu Road side of the peninsula and would be a valuable addition in that regard. Nevertheless, its benefit would be experienced more in relation to that reinforcement given its distance from the viewing audience at Omaha Beach, especially in the initial period of 5 – 10 years.

### Existing Native Vegetation

[40] Hubbards Bush is the area marked *Policy Area 1bp* on Appendix C of some 111ha. Without derogating from the values of the area marked *Policy Area 1e* next to *Policy Area 6* and the wetland areas *Policy Areas 1cw* and *1fw*, this is one of the most significant areas of native vegetation within Rodney District and certainly within the ECRZ area. Although not readily visible from any publicly accessible points or sighted from any public roads, aspects of the bush can be seen from Tawharanui Regional Park. Photographs show well-established kauri rickers moving to maturity along the ridges and dense native bush which appears to have been undisturbed for a considerable period. Although the area is not specifically fenced within the farm boundary, the fencing along the regional park and other boundaries does seem to have led to a measure of general protection from encroachment from either domestic stock or exotic vegetation.

[41] All parties acknowledge the high values of this indigenous vegetation, and one of the issues in dispute was whether or not it would be as well protected by the ECRZ provisions as it would by the special zoning promoted by the applicant. Similar arguments rise in respect of the other areas; *Policy Area 1e*, *Policy Area 1fw*, and *Policy Area 1cw*.

[42] Much of *Policy Area 1e* is of marginal value given that it has been heavily compromised by stock and is only partially covered by indigenous vegetation. Why the applicant has chosen to treat the coastal forest adjacent to *Policy Area 6* on the same basis as *1e* is unclear to us. This area is a rare example of coastal forest on the



beachfront. There are a number of very large native trees visible. Although we could not check the overall standard of the area, we were told by an ecologist that it was in good condition. Again, the question is whether or not the ECRZ or a special zone would better recognise and protect those values.

[43] Finally in this regard we should mention Te Kie Point. Its value does not relate directly to native vegetation, although there are several pohutakawa specimens on or near the pa site. It represents the southern of the headlands containing the Whangateau Harbour and Omaha Beach, and the distal spit. It is a prominent landmark and has recognised cultural values. The issue in this case was whether or not the use of the lower slopes of Te Kie for a café/interpretation building was appropriate. Under ECRZ other activities may be considered as discretionary activities, e.g. the Robertson consent allowed two houses to be built in this general area (including where the proposed *Policy Area 2rl* is). The applicant suggested a setback from the pa trench of some 50m, but the appropriate context for this pa site and the headland itself is a matter of some importance in the case.

### Urban Containment

[44] The key objection to the proposal raised by the Regional Council was that the applicant had not followed an appropriate process for the establishment of an Urban area. This case was unusual in that there was no dispute that the area of Seaview Village (*Policy Area 4v*) would create an urban area. This then led to a dispute as to whether the creation of an urban area is inconsistent with the Auckland Regional Policy Statement (ARPS) and achieves and implements the objectives and policies of the District Plan.

[45] It is common ground that the ARPS seeks to contain urban development within defined urban limits. This consists of three elements:

- [a] Metropolitan Urban Limits (MUL) (the parties are agreed that this site is well outside those limits);
- [b] Rural towns;
- [c] Coastal settlements.



[46] Of these, it was accepted that the current proposal affects lands adjacent to, but not currently part of the coastal settlement of Omaha Beach. It is clear that urban growth is seen as placing pressures on natural resources (*Policy 2.3.2*). There is particular concern about:

- [a] semi-enclosed harbours;
- [b] the need for water and wastewater; and
- [c] pressure on roading.

[47] There is also no doubt that the ARPS is concerned with potential impacts on coastal areas and this is developed at *2.5 The Strategic Direction* including *2.5.1 Strategic Objectives*:

- 4. To preserve the natural character of the coastal environment ...

[48] In the ARPS at *2.5.2 Strategic Policies* are discussed. Of particular interest to the Court on this occasion is point 3:

- 3. Urban development is to be contained, within the metropolitan urban limits shown on Map Series 1 and the limit of rural and coastal settlements as defined so that:
  - (i) expansion of urban activities outside the metropolitan urban limits as defined and shown in the RPS from time to time is not permitted;
  - (ii) environmental values protected by the metropolitan urban limits and/or the limits of rural or coastal settlements are not adversely affected, and that the integrity of those limits is maintained;
  - (iii) ...
  - (iv) expansion of rural and coastal settlements outside the limits of existing urban zones and settlements (at the time of notification of the RPS or as shown provided for in the RPS) is not permitted;
  - (v) the identification and provision of areas for future urban growth are managed through an integrated process on a regional basis and are consistent with the Strategic Direction.

[49] The first point to be made from this is notwithstanding the clarity of the initial statement at *2.5.2(3)(ii)*, this is derogated by (v) which clearly contemplates an urban area outside the existing urban limits. In *2.6.2 Methods*, 7 & 8 add to our understanding of what is meant by the Strategic Direction:



7. Each TA shall set out within its District Plan issues, objectives, policies and methods for enabling the management and development of rural and coastal settlements.

This shall:

- i) be an integrated consideration of the relevant issues;
- ii) be integrated with the urban and rural components of the District Plan;
- iii) not be inconsistent with the RPS.

Where this method has been complied with, expansion of rural and coastal settlements in district plans beyond the limits applying at the date of notification of the RPS shall be deemed to have been provided for for the purposes of strategic objective 2.5.2.3(iv) and policy 2.6.1.2 of the RPS.

8. Significant new areas proposed for urban development ... are to be provided for through the Structure Planning Process (or other similar mechanism).

[50] From this and reading the submissions and evidence of the Regional Council, it appears to us that there are essentially three issues at large:

- [a] Can an individual developer/land owner undertake the integrated consideration of the relevant issues by way of seeking amendments to the Plan, rather than the Council itself, given that submissions on the Plan do not require Section 32 RMA analysis?
- [b] Is this current proposal an expansion of a coastal settlement beyond the limits applying at the date of notification of the ARPS (or looking at 2.5.1 from time to time)?
- [c] Is the planning process which has been adopted a similar mechanism to the structure planning method identified in *Method 2.6.2(8)*?

**Is *Method 2.6.2(7)* available to individual landowners rather than just territorial authorities?**

[51] Mr Berry argues that this appeal on a Proposed Plan is not a similar mechanism to a Structure Plan. Mr Green for Omaha Park, not unnaturally, is most concerned at the suggestion that his client has utilised the submission and appeals procedure of the RMA plan change process to inappropriately seek an urban zoning.





He points to the clear powers of landowners to seek changes to a plan of their own initiative.

[52] Clause 25(4) of the First Schedule of the Act makes it clear that the grounds on which an application for plan changes can be refused to be processed are relatively limited. The circumstances are discussed in more detail in a recent decision of this Court, *Malory Corporation v Rodney District Council*<sup>5</sup> upheld an appeal.

[53] For current purposes, Mr Green argues that as a matter of principle, it must be open to an individual landowner to seek a different zoning from that notified in respect of his property if he disagrees with it. Further it follows that such a zoning must be able to include an urban zoning if the landowner believes that it can be justified in the circumstances.

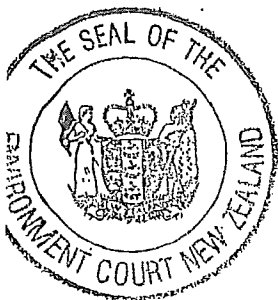
[54] Mr Berry might be suggesting that the ARPS prevents individual landowners from making a submission on a plan change to seek an urban zone. Such a constraint would be to impose a restraint not required by the Act and arguably contrary to it. We are unclear as to whether Mr Berry was going this far in his submissions, but we consider the matter out of an abundance of caution.

[55] Section 62 of the Act identifies the contents of regional policy statements. It is clear that subsection 1(e) includes methods, but excludes rules. While it enables processes to be used to deal with issues that cross local authority boundaries, those processes do not appear to include any form of delegated legislation. Whilst there is no doubt that the MUL is an extremely strong provision in terms of the ARPS, we do not understand the import or effect of the Court of Appeal decision in *Auckland Regional Council v North Shore City Council*<sup>6</sup> to expressly, or by inference, suggest that the policy is to be interpreted as a statutory provision overriding where necessary the provisions of the Act.

[56] We conclude that the intent is, where the provisions of the ARPS can be read alongside the Act, that the Court would strive wherever possible to give effect and meaning to both the ARPS and the Act. In considering 2.5.2 and 2.6.2 of the ARPS,

<sup>5</sup> CIV2009-404-005572, Priestley J, at paras [63] – [66]

<sup>6</sup> [1995] NZRMA 424



the ARPS clearly provides for an exception to the MUL for new areas under *Methods* 7 & 8 in circumstances where:

- [a] there has been an integrated decision of the issues;
- [b] that achieves a change to the Plan (or Proposed Plan); and
- [c] that it has gone through an appropriate mechanism (Structure Plan or similar).

[57] Accordingly, we conclude that a landowner can seek a change in appropriate circumstances on a Plan review.

**Is this an Expansion of a Coastal Settlement under Method 2.6.2(8)?**

[58] So while the ARPS is clear that urban development outside the MUL and existing coastal and rural settlements is not generally provided for, the ARPS itself includes both an exception for expansion of rural and coastal settlements and also for new areas established by Structure Plan or similar method.

[59] A clear example where this approach has been adopted is Omaha South where the submissions to the Plan led to the inclusion of Omaha South as part of the urban area being an expansion of Omaha North. That provision now being part of the Plan, the question is whether or not Seaview Village, being an urban area proposed, can be added as a further urban area adjoining Omaha South.

[60] Given the wetlands that bound Omaha South are adjacent to the Seaview area, it might be said that the area does not adjoin or constitute an expansion. However, upon closer scrutiny, it is clear that there is a roading connection with land zoned urban adjoining the road and area adjacent to Seaview Village. Moreover, the wetland area itself is part of the urban area, although constituting the boundary of it.

**Does a Proposed Plan Appeal Constitute a Similar Method to a Structure Planning Process 2.6.2(8)?**



[61] The final issue is whether or not this Proposed Plan appeal would be a sufficient method to include the area as a new urban area under *Method 2.6.2(8)*. This does not seem to be in dispute by any party, including the Regional Council. Rather, the argument was that it was not a process similar to that provided for as a *structure planning process* within the ARPS or in fact under the District Plan.

[62] The structure planning process is one which is outside the scope of the Resource Management Act. However, both the Regional and District Council have used the Structure Plan approach when considering expansions within their various territories. There is also a Structure Plan in respect of Omaha Flats area, adjacent to Point Wells. Others are either adopted or are being considered in other areas of the district.

[63] Nevertheless, the parties were on common ground that neither the Regional Council nor the District Council had adopted a Structure Plan process to consider urban expansion in the Seaview area. It is clear that the Regional Council, and to some extent the District Council, have decided to adopt an approach to urban growth of monitoring and management outside the RMA process (see the *Forward to the ARC Guide, Section 1.3 What is Structure Planning?*) Nevertheless, it is clearly recognised in those documents that any structure planning mechanism would need to eventually be subject to an RMA process.

[64] What Mr Berry appears to be arguing for the Regional Council is that any requirements of the structure planning process which are different to, or additional to the requirements of the RMA are incorporated into RMA planning considerations. In other words, a process similar to that set out by the Regional Council and controlled by them must be adopted. The corollary to this argument must be as Mr Green suggests that the Regional Council must be the only party entitled to decide where urban growth can or cannot occur, notwithstanding the provisions of the RMA.

[65] To the extent that Mr Berry criticises the RMA plan submission process as not providing for all elements of a structure planning process, we take it that he is arguing that the RMA process is not sufficient in terms of the ARPS as a structure planning process or *similar mechanism*. If the ARPS contains policy statement provisions or requirements which go beyond the Act, they are introducing irrelevant considerations,



and seek to modify the provisions of the Act. Under pressure from the Court we understood Mr Berry to have conceded as much.

[66] Nevertheless, if it remains the Regional Council position that they are able to modify the terms of the Act in a policy statement (which we do not accept), then it is a significantly greater call to suggest that the Regional Council can modify by implication statutory provisions that give rights to people beyond those provided through Regional Council documents. In particular, we agree with Mr Green that the Act specifically provides for parties to promote changes to a Plan during the submission process. That clearly includes the power to seek re-zoning, and in fact privately promoted plan changes are explicitly provided for in addition to those rights of submission.

[67] We conclude that the right to promote an urban area as part of a plan change, even on a privately promoted plan change, must be preserved. Accordingly, an appeal on plan provisions such as we are currently addressing must constitute a *similar mechanism* for the purposes of the ARPS 2.6.2 Method 8. The major distinction between the process promoted by the Regional Council and the RMA process is the extent of consultation and also the centrality of the Regional and District Council officers to the process under the structure planning arrangement (where the Council advances the proposal).

[68] We note in particular the commencement of *Method 2.6.2(7)* reads:

7. Each TA shall set out within its District Plan issues, objectives, policies and methods for enabling the management and development of rural and coastal settlements.

[69] There is no doubt that the appeal is to be examined against, and must take into account, the settled provisions of the Proposed Plan. The extent to which this has been done is a question of merit. We acknowledge that at the time the submissions were made on the Proposed Plan, the Plan was in a somewhat different form. Accordingly, the ECRZ has become a clearer entity in its own right than it was at the time of the original Plan promulgation.



[70] We have particularly considered the impact of the case *Auckland Regional Council v North Shore City Council* in the Court of Appeal when declarations were relevantly made that:

- (i) urban development shall be permitted only in urban areas *defined* in the *Statement*; or, in the case of rural towns or coastal settlements areas, by the extent of existing urban zones and district plans (as at the date of notification of this statement) or in accordance with a change to the District Plan prepared in accordance with policies referred to in the Statement.

[71] We note that the Court of Appeal was anxious to state at page 11:<sup>7</sup>

In conclusion, it must be stressed that the appeal in declaratory proceedings and the argument in this Court have been concerned solely with issues of *vires*: that is to say, with the kind of provisions that are permissible in regional policy statements. They have not been concerned with the merits or otherwise of the particular provisions challenged in the proposed Auckland Regional Policy Statement.

[72] Accordingly, we do not accept that the addition of new urban areas can only be dictated by the Regional Council outside of the RMA process. To that extent we do not accept that the Court of Appeal decision in any way substituted a process outside the RMA for that constituted within the provisions of the Act itself.

[73] It must follow from these conclusions that the proposal itself cannot be said to be inconsistent with policy methods of the ARPS, particularly 2.6.2(7) and 2.6.2(8) per se, but that it may be inconsistent both in the degree to which it implements and achieves the objectives and policies of the ARPS as a whole and/or the objectives, policies and methods of the District Plan, or the extent to which it meets each of those requirements.

[74] Before considering further the Omaha Park proposal, it is now important to understand the impact of the ECRZ, which has been prepared under the ARPS, to achieve and implement the objectives and policies of the District Plan. No party before this Court suggested that the ECRZ was inconsistent with the ARPS or did not achieve and implement the Proposed District Plan.

#### **The East Coast Rural Zone**

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<sup>7</sup> [1995] NZRMA 424 page 11



[75] The preliminary point which needs to be made in respect of the Proposed District Plan is that it is based upon a dichotomy between urban and rural areas. This distinction is borne out both in a functional sense, the purpose of each zone, and also in the particular amenity characteristics. Within the rural area there are a range of general categories from Countryside Living to General Rural. It is intended that rural residential demands are recognised and provided for largely within the Countryside Living Zone (see *Chapter 4.5.2.1*). Beyond that, Rural Residential Living is provided only where environmental benefit is provided/achieved. However, those opportunities are provided in such a way that blanket and extensive areas of Countryside Living do not occur. Beyond the functional purpose of the Rural Zone to provide for native bush; landforms and landscapes, (natural character) are the broader purposes of maintaining rural character and amenity, and enabling primary production and forestry (see *Chapter 4.5.2.2* and *Chapter 4.5.2.3*). With certain zones such as East Coast Rural the special character of the areas is also identified and protected.

[76] Within urban areas there is the desire to maintain and enhance amenity values of neighbourhoods and residential areas within business zones and for future development to provide for the requirements of other activities within the city. There is also provision within urban zones for open space which is intended to meet recreational needs of the existing and future population (see *Chapter 4.5.6*). Public access along coast, wetlands, lakes and rivers is an important element.

[77] The ECRZ is one of the sub-zones of the General Rural area provided for in *Chapter 7* of the District Plan. In *7.1 Introduction* it identifies that there are "pressures in coastal areas, particularly on the east coast north of Orewa". The Proposed District Plan introduces the matter in this way:

... Once again the demand for lifestyle activities places significant pressure on the coastal landscapes, the beaches and harbours of the District. These coastal environments are of regional significance and require specific consideration with respect to the possible adverse effects of further subdivision and development.

[78] The *Introduction* specifically recognises the dynamic nature of the rural environment. It cannot be said that the Plan intends that there be no change within the ECRZ or other rural zones. Under *7.2 Resource Management Issues*, subdivision and land use is identified as a major impact upon rural character. The link with



subdivision is identified at *Issue 7.2.1*, page 4. The impact on amenity values is recognised at *Issue 7.2.2* and the potential affect on native plants and animals and biodiversity at *Issue 7.2.4*. Many of the other provisions under 7.2 *Resource Management Issues* identify particular affects on productivity, biodiversity, the natural environment, and cultural values.

### Objectives of the Plan

[79] *Objectives 7.3* go on to identify in particular the desire “to maintain and enhance the rural character of the District”, particularly the impact upon amenity values (*Objectives 7.3.2, 7.3.3, 7.3.4*). There is a desire to maintain both productive efficiency, but also native biodiversity in *Objective 7.3*.

[80] *Policies 7.4* particularly identifies that “intensive subdivision and activities which are primarily rural residential based should be located close to metropolitan Auckland”. This policy clearly is aimed at rural residential activities, not urban activities. Accordingly, these policies would be applicable to the balance of the site, but not to the Seaview area itself if considered under the proposed zoning.

[81] Questions of rural character are addressed in a number of ways, and it can be seen that there is a connection with amenity values, *Policy 7.4.4*. Many of the policies in *Policies 7.4* follow through on matters identified in the *Objectives*. The strategy of the objectives and policies are identified in *Strategy 7.5*:

- (a) To recognise and where appropriate, protect and enhance rural character and rural amenity values;
- (b) To ensure subdivision, development and activities are of a rural character and occur with minimum adverse effects upon the existing rural character and amenity values in each part of the District;
- (c) To protect highly valued natural resources, such as significant native bush, significant wildlife habitats, significant landforms and significant landscapes;
- (d) To protect, manage and enhance native plant and animal biodiversity.

...

[82] This Strategy is ameliorated to the extent that it does allow “some rural residential subdivision opportunities” where there is the prospect of protection of significant native vegetation or enhancement planting, *Strategy 7.5(g)*.



[83] The implementation methods under *Implementation 7.6* include a number of zones of which one is the East Coast Rural Zone. The explanation at page 30 notes:

The East Coast Rural, Dune Lakes and Landscape Protection Rural Zones are all distinctive in character because of their high landscape and natural environment values. Therefore, it is important that these values are retained, especially in the East Coast Rural Zone where the pressure for subdivision is high because of access to and views of the coast. The density of subdivision, development and activities that can occur is controlled in these zones.

[84] Again in *Anticipated Environmental Results 7.7* follow the same pattern we have already described in respect of the Objectives and Policies with an emphasis on rural character and amenity, maintaining versatility of the land resource, including soils, and maintaining, enhancing and protecting native plant and animal biodiversity.

[85] *East Coast Rural Zone Objective 7.8.2.1* states:

*Objective*  
7.8.2.1.1

To retain the open, high quality coastal landscape character of, and the natural environmental values present within the Zone, whilst enabling the continued operation of rural production activities.

*Objective*  
7.8.2.1.2

To protect and enhance natural areas and features, including landscapes, streams, rivers, lakes, estuaries, harbours and wetlands.

[86] *East Coast Rural Zone Policies 7.8.2.2* again reflect the desire that any:

*Policy*  
7.8.2.2.1

Activities and subdivision should not adversely affect the high quality coastal landscape ... through urbanisation, subdivision and the effects of activities.

[87] *Policy 7.8.2.2.2* indicates that:

*Policy*  
7.8.2.2.2

Activities should be limited to those of a non-urban, rural nature and scale ...

This is also reflected in *Policy 7.8.2.2.4*.

[88] There is more detail in other policies, including of particular interest in this case *Policy 7.8.2.2.6* and *Policy 7.8.2.2.7* which requires:





*Policy*  
7.8.2.2.6

Subdivision and land use activities should be undertaken in a manner which results in:

- (a) hydrological neutrality;

...

*Policy*  
7.8.2.2.7

Further subdivision and rural residential lifestyle opportunities should be limited in this zone and should only occur when undertaken as part of enhancement type subdivision such as protecting significant natural areas ...

[89] *East Coast Rural Zone Description 7.8.2.3* discusses the Tawharanui area, east of Omaha Flats to the southeastern corner of Omaha Spit. The subsequent discussion goes on to identify the various aspects of landscape significance, identifying issues such as remoteness, naturalness, non-urban character, beaches, coves, estuaries, native bush, farming and forestry. At the end of this explanation it notes:

The range of activities is limited and the nature and type of subdivision is controlled so as to retain rural character generally and the distinctive character and landscape and environmental issues that exist in this Zone as well as amenity values appropriate in this setting.

[90] Overall, there is no doubt that ECRZ zoning seeks to control development, particularly residential, to maintain the landscape, biological and other features of the area, while providing for primary and forestry production. The vegetation enhancement development provided for is loosely based upon the *Di Andre* case which approach was followed later in the decision in *Arrigato*. These cases adopted an approach of enhancing or protecting native vegetation for development rights. The Di Andre land includes some of the Seaview Village area proposed, but is mostly the land immediately above it now proposed to be included within the greenbelt.

[91] In broad terms the Proposed Plan gives potential development rights based on the type of area protected or enhanced from wetlands through existing native vegetation through to future enhancement planting. In respect of very highly valued areas such as wetlands, the ratio for development is close to 1 for every 5000m<sup>2</sup> of wetland. For those areas of enhancement planting however, a minimum 6ha requirement is made for a development right. This is in relation to the right to develop one additional residential lot. However, the number of lots to be created is currently the subject of fairly rigorous controls. The upper limits on the number of lots that might be created are yet to be settled in terms of the Plan. It should be noted also that



all of these activities still remain at least restricted discretionary or full discretionary, and that the range of discretions is very broad.

[92] The Regional Council is seeking non-complying activity status for significant enhancement planting in the East Coast Rural Zone amongst other Special zones. Moreover, part of the Omaha Park site, particularly the area beyond Seaview Village and at the top of the ridge is an outstanding landscape area and/or feature. In terms of the operation of the ECRZ area these would be areas where particular consideration would need to be given to these values in any particular proposal, as we shall see shortly in respect of the Omaha Park proposal.

[93] Overall, residential buildings in the ECRZ are at least restricted discretionary activities, even where the core activity itself is permitted. Thus the Council reserves to itself control over certain elements of construction of all buildings within the District, particularly residential homes. Certain activities such as forestry and farming are permitted, whereas others such as homestay for more than 10 people are full discretionary. Retirement homes and the like are non-complying activities within the ECRZ.

### **Omaha Park Limited Proposal**

#### ***Seaview Village***

[94] As can be seen from the attached map hereto marked **D**, the Seaview Village is intended to be established on land behind the wetland and behind Omaha Beach. It is situated on the alluvial/colluvial materials related to the higher areas behind and is within a natural basin. Nevertheless, there are significant changes in topography over the area with contours at the northeastern and northwestern side between 0m – 5m, rising to contours over 50m to the west of the Tunnicliffe property. Most of the land for development would be between the 10m – 35m contour, with the area on which the commercial sites would be placed being the end of a spur between the 20m – 30m contours.

[95] The original proposal was for 500 – 800 houses in the area. This was modified during the course of the hearing in light of the applicant's own experts' responses to questions, to 300 houses with the capacity as a restricted discretionary activity for up



to 500 houses. The Build Media Development Plan prepared from Boffa Miskell showed the development on what appears to be properties up to the 35m contour with build heights up to 10m giving possible RL for the highest buildings of around 45m.

[96] Annexure E is a version of one of the development plans. It can be seen that it is intended that there be wetland ponding areas adjacent to the existing wetlands. An area of open ground in front of the village centre was unexplained to us during the hearing but it may be intended for parking. There is a wetland corridor through the central area of the village connecting to the greenbelt around the balance of the site. Running behind the greenbelt and along the western ridge is the road that will join Takatu Road. The exact alignment of this new road was unclear. The alignment originally proposed to the Court was one which involved a property not under the control of the applicant. It appears an alternative route may involve significantly more earthworks and its exact alignment is a little unclear to the Court at this point in time.

#### *Te Kie Point*

[97] A major area of interest to the Court was the area of Te Kie Point which is adjacent to the Seaview Village area and marked as Area 3 on Annexure A. It may be that the intention of the applicant is that this be zoned Rural rather than an Urban zoning given that it is shown as *Policy Area 3* and is next to *Policy Area 2rl* and connecting with the Ching property which would remain ECRZ. Nevertheless, Te Kie Point itself is intended to have an information/café facility on it, situated on the Omaha Beach side of the slope with associated carparking. It would be accessed from the road shown exiting north on the eastern side of the map.

[98] Although originally the maximum size of this building could have made it a very dominant feature, the maximum size was reduced considerably during the course of the hearing. The balance of the land in Area 3 including the Pa site is intended to be vested as Public Reserve.

[99] There remains a saddle area between Te Kie Point and the Ching property which was intended by the applicant to be *Policy Area 2rl*, essentially providing another residence in this area. However, we did not understand the witnesses to be suggesting that *Policy Area 3* was to be an Urban area, but rather more closely



associated with the *2r1* and ECRZ of the Ching and Abraham properties. The eastern side of Seaview Village would therefore be bounded by *Policy Area 3* and ECRZ (Ching and Abraham) with *Policy Area 5* behind that. In the central area the Seaview Village greenbelt would be backed by the water dam in *Policy Area 2i*, and the central area of the Mitchell and Tunnicliffe property would be ECRZ backed by *Policy Area 1e, Conservation (Rural Enhancement)*. To the west, the applicant's land would be controlled in the same way with some of the area being *Coastal Wetland ("CW")*. Nevertheless, the neighbouring property of Smith and Hardy would remain ECRZ (at least in the interim). The other neighbouring reserve land containing the Old Quarry is part of the Omaha South Special Zone. We will now deal briefly with the other policy areas.

### ***Policy Area 5***

[100] This is an area of existing but senescent pine forestry which falls gently from the boundary with the *Policy Area 2i* towards an attractive coastline and the boundary with the Tawharanui Regional Park. It is dissected by a number of ephemeral waterways, some exhibiting wetland features. The waterway which terminates at Pukenihihi Point has a substantial wetland feature behind the existing houses (four including the old farmhouse). The Hauser homestead, which obtained a resource consent, is an extremely large home immediately behind Pukenihihi Point and is a dominant feature from many viewing points within the Regional Park. It is also very close to the coast.

### ***Policy Area 6***

[101] To the north of this Pukenihihi Point is *Policy Area 6* and a *Policy Area 1e*. *Policy Area 6* is where it is intended to have a lodge development with up to 35 units, a café and associated parking. This area is immediately adjacent to a remnant area of coastal forest (*Policy Area 1e*). This is coastal forest remnant, accepted as being regionally rare and of high value. We are unclear why the applicant has chosen to place the lodge near this area rather than closer to Pukenihihi Point where the existing houses have already compromised the landscape. Nevertheless, there is a spur ridge between *Policy Area 6* and Pukenihihi Point which would to some extent screen the lodge from the houses and Tawharanui Regional Park. There is an



ephemeral stream flowing immediately in front of the *Policy Area 6*, and details as to how stormwater would be controlled, riparian planting and the values of the stream protected were not addressed in any particular detail.

[102] Before we leave this area we should note that the applicant's own witness identified that there had been a major Maori tribal battle near Pukenuhinihi Point. There was some dispute as to exactly where it took place, but there is likely to be koiwi in place. The suggestion was that the battle was close to *Policy Area 6* and the existing coastal forest remnant. There is also a pa in this vicinity although not inside *Policy Area 6*.

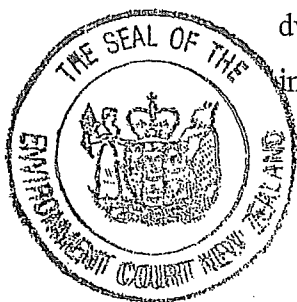
[103] It was also acknowledged that notwithstanding any screening from the regional park, there would still be views of both the lodge and any housing from the sea, particularly from immediately in front of *Policy Area 6*.

### ***Golf Course***

[104] There was initially some discussion of a golf course in *Policy Area 5*, but concessions by the applicant's witnesses made it clear that this was unlikely to be realised as an outcome. The cost of formation of a golf course to international standards would be prohibitive, especially considering that there is a good quality 18-hole golf course already at Omaha Beach.

[105] This of course gives rise to the question of what should be done with the balance of the *Policy Area 5* land. The applicant had intended cluster housing in the midst of the golf course, but did not explain how these would be accessed given the many ephemeral streams that would need to be crossed. It appears that if there was to be clustering of houses, this may be closer to the top of the ridge to give commanding views towards the sea (and provide lower infrastructure costs).

[106] Without the golf course it is difficult to see the distinctions between this area and the other areas of *Policy Area 2rl*, unless it is intended that the density of dwellings be at a significantly higher level. Nor is it clear why the applicant did not intend to include this cluster housing within the wastewater treatment system, given its



proximity to it and the reasonably low cost of connection particularly if the houses were constructed on the ridge near *Policy Area 2i*.

[107] What was accepted in response to questions from the Regional Council was that all houses in *Policy Area 5* would be fully screened from the Regional Park so that they could not be viewed from any position within it. We agree that with a mix of topography and planting this would be easily achievable and we have already identified that the predominant view from the Park would be towards the existing house at Pukenihinihi Point in any event.

[108] It is proposed that water and wastewater for the lodge would be supplied from *Policy Area 2i*, but the same suggestion was not made in respect of the cluster housing. We are unclear why not. We are also unclear as to how such roading and other infrastructure would be provided given the number of ephemeral streams. The lack of detail makes it difficult to comment on the impacts overall.

#### ***Rural Living Policy Area 2rl***

[109] *Policy Area 2rl* is the other area which is intended to have rural residential development. It appears to be intended that this be at a higher density than that permitted under the general ECRZ, possibly because of the protection of considerable areas of native vegetation (Hubbards Bush) and areas of enhancement and existing native vegetation throughout *Policy Areas 1e* and *1ws*. Again, there was no detail given as to why the particular arrangement of a long string of houses along the ridge has been adopted, rather than the more common approach in this area of clustering houses either close to the road or on a ridge feature facing the water. We note that water and waste is to be dealt with by each property owner.

#### ***Development in East Coast Rural Zone***

[110] We should note that under the ECRZ provisions, a restricted discretionary or full discretionary application could probably be made for somewhere between 40 – 70 houses over the total area of Omaha Park. There are some five homes in existence already which would need to be factored into the calculations. In saying this, we rely



only on the general comments of the witnesses and it is clearly acknowledged that no consent would necessarily be forthcoming as the criteria are rigorous.

[111] Excluding the lodge, the Omaha Park proposals in *Policy Area 2rl* and *Policy Area 5* might result in up to 50 houses. The information centre/café at Te Kie Point, lodge at *Policy Area 6* and Seaview Village itself are additions over what might realistically be achieved under ECRZ. The level of development which might occur under ECRZ is roughly equivalent to that in *Policy Area 2rl* and *Policy Area 5* under the Omaha Park proposal.

[112] For the development of this area as ECRZ there would obviously need to be enhancement planting and the parties seemed to be agreed that a similar amount of planting would be required under the provisions of the ECRZ as proposed for the Omaha Park proposal. Similarly, Hubbards Bush would inevitably be protected both under ECRZ and the OPSZ in the event of development.

### Infrastructure

[113] Opposing parties raised the feasibility of Omaha Park being able to construct and operate the engineering infrastructure required to support the proposed development. We acknowledge that even if were to approve the zone change, Omaha Park would still be faced with obtaining a considerable number of resource consents for this infrastructure and that there can be no guarantees that these consents would be granted.

[114] We are required under Section 290A of the Act to take into account the Council's decision to refuse the OPSZ rezone. The decision noted:

In determining the appropriateness of any such development the wider impacts of any such development need to be considered in relation to matters such as impacts on air and water quality, natural character, landscape values, coastal and open space values, as well as urban and rural amenity values and the specific carrying capacity of the land area in question ... It is considered the proposed new zoning has not been developed on the basis of any such detailed studies or structure planning exercises to determine the appropriateness, or otherwise, of the proposed land uses ...

[115] Evidence for Omaha Park on the infrastructure was provided by Michael Lee (land development and engineering); Robert Docherty (water supply, wastewater and



disposal); Barnaby Harding (water supply and wastewater assessment); Roger Seyb (storm water collection and disposal); Brian Handyside (erosion and sediment control); and Richard Knowles (geotechnical engineering).

[116] For ARC, Mr Earl Shaver provided evidence on storm water management and erosion control whilst Mr Tony Reynolds provided evidence for OBC on the potential effects of the OPSZ development on a bore which currently supplies water for irrigating the southern part of the Omaha Beach Golf Club.

[117] In addition, traffic evidence was provided by Tony Penney (for Omaha Park), Andrew Murray (for RDC), Tony Innes (for the NZ Transport Agency) and John Parlane (for OBC). The traffic effects from the proposed OPSZ development primarily impact on the wider roading network.

[118] We now provide an overview of the infrastructure commencing with a discussion of the water catchment, geology, groundwater and recharge issues before addressing:

- [a] Stormwater erosion and sediment including potential impacts on Whangateau Harbour and the Christian Bay Wetlands;
- [b] Waste water reticulation, treatment and disposal;
- [c] Water supply;
- [d] Proposed ownership and operation of water and wastewater infrastructure;
- [e] Infrastructure consents;
- [f] Roading and traffic.

Details of the five catchments and the proposed developments within each are described in the following paragraphs.



#### *Catchment Developments*



[119] The 90ha Tawharanui Regional Park/Jones Bay catchment is contained within the Conservation Bush (Bush Preservation) *Policy Area 1bp*. No development is proposed in this area apart from some small tracks and as such no changes are envisaged to the existing run-off within the catchment.

[120] The 180ha Christian Bay catchment includes a freshwater wetland of about 13ha in its lower reaches. Significant developments proposed within this catchment include the water supply dam and reservoir; potential wastewater disposal in Conservation (Enhancement) *Policy Area 1e*; rainwater harvesting for water supply within Rural Lifestyle *Policy Area 2rl* and run-off from accessways, paved areas and tank overflows.

[121] The 135ha Waikokopu catchment forms the headwaters of the Whangateau Harbour. This catchment is straddled by Conservation (Coastal Wetland) *Policy Area 1cw*, Conservation (Enhancement) *Policy Area 1e* and Rural Lifestyle *Area 2rl*. Developments proposed within this catchment include the rural lifestyle residences in *Policy Area 2rl* and likely wastewater disposal in Conservation (Enhancement) *Policy Area 1e*.

[122] The 85ha Tokanui Point catchment discharges into Waikokopu Creek north of Tokanui Point. This catchment is straddled by Seaview Village *Policy Area 4v*; Village Enhancement *Policy Area 4e*; the Interpretation/Public Recreation *Policy Area 3* and the nearby *Policy Area 2rl*. Development in this catchment includes the commercial and residential buildings and associated infrastructure for the village, the interpretation centre and the residences in *Policy Area 2rl*. All of this development will have a significant impact on run-off in the catchment although we note that it is proposed for the wastewater from all the buildings in *Policy Areas 4v, 3 and 2rl* to be collected and piped to the wastewater treatment plant.

[123] The 180ha Omaha Bay catchment is straddled by the Cluster Housing and Recreation *Policy Area 5*; the Visitor Lodge Accommodation *Policy Area 6* and part of the Conservation (Bush Preservation) *Policy Area 1bp*. The existing catchment includes four houses adjacent to the beach whilst the proposed development could have up to 34 houses within *Policy Area 5* and the lodge in *Policy Area 6*.



[124] Mr Berry in his opening legal submission for the ARC provided a helpful summary of some of the regional council consents which are likely to be required if the OPSZ proposal was to proceed. These include consents for the discharge of domestic wastewater (discretionary); urban area storm water discharge (discretionary); storm water or waste water discharge via a pumping station or network overflow (non complying outside urban area); damming of a permanent water course (non complying); and taking of water from a dam or permanent stream (discretionary). We note that this is not an exhaustive list.

### *Geology*

[125] Whilst we were told that there has been some foundation investigation drilling undertaken across the proposed site for the village, we were also told by Mr Knowles that there had been no drilling at the site of the proposed water supply dam and reservoir. In fact the investigation of the dam and reservoir site had been restricted to a walk over of the site and a review of some aerial photographs with this identifying some bedrock close to the surface in the vicinity of the dam.

[126] This low-level of investigation seemed surprising to us given the critical importance of this key infrastructure element for the proposed development. We would have thought that there might have been at least limited sub-surface investigation to provide more certainty as to the suitability of the geology under and around the proposed dam site and along the slopes of the reservoir. Impounded water up to 12m deep would be most unforgiving in seeking out leakage paths particularly through any unstable debris material. This is particularly so, given Mr Knowles advice that there has been some previous instability in the slopes within the catchment area.

[127] Mr Knowles also advised that no consideration had been given to the risk implications of locating a dam at the top of the Christian Bay catchment.

[128] Overall it was his opinion there were no features in the construction of the dam or reservoir which could not be *engineered*.

### *Groundwater and Recharge to Aquifer*



[129] Tony Reynolds called for OBC, identified potentially adverse effects on the Omaha Beach Golf Club groundwater bore from the development proposed in *Policy Area 4v*, including:

- [a] a reduction in groundwater levels as a result of reduced direct and indirect recharge;
- [b] an increased risk of saline intrusion; and
- [c] a change in groundwater quality.

[130] In his rebuttal evidence for Omaha Park, Mr Harding agreed that the development proposed in this policy area would result in a reduction to the groundwater recharge. Notwithstanding, he estimated that there would be an availability of 25,000m<sup>3</sup> per day at the golf club bore, compared with the consent level of 20,000m<sup>3</sup> per day. Mr Reynolds responded to a question from Mr Young that whilst he did not agree with Mr Harding, he had not undertaken his own assessment of the availability levels.

[131] Unfortunately, the two experts had not consulted with each other in an endeavour to reconcile their differences on the groundwater recharge. We note that the Court's Practice Note requires experts to consult. We also note that Mr Harding proposed that, unless proven to be unnecessary as a result of more detailed studies, the impervious areas and any water collection within *Policy Area 4* should not be increased beyond what is shown on the current concept plans.

[132] Given the lack of agreement between the two experts on the effects of Seaview Village development on groundwater recharge, we are unable to take this matter any further. In any case, its further examination and resolution would form part of the resource consenting process which would arise if the rezoning was to be approved. We include reference to it here to highlight the sort of issues which would need to be resolved during any consenting process and which could potentially stand in the way of Omaha Park obtaining the consent(s) necessary for the development to proceed.



*Stormwater, Erosion and Sedimentation: Impacts on Whangateau Harbour and Christian Bay*

[133] As the applicant's case advanced, questions arose as to how stormwater was to be handled. It then transpired that the plans showing the wetland areas had not been fully sized for the type of development envisaged. Given the change in size of the village it is now unclear whether or not further ponding is required. Issues relating to sediment removal are still unresolved, but the applicant proposes that the waters be treated and then discharged into the Whangateau Harbour along the existing stream alignment.

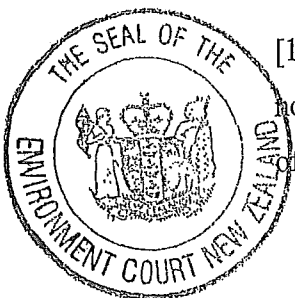
[134] The potential effects from both storm water and sedimentation run off in development projects involving substantial earthworks need careful consideration. In this context we heard extensive evidence on the measures proposed to minimise these effects for the proposed OPSZ.

[135] Starting with *Policy Areas 5 and 6*, Dr Andrew Lohrer, an estuarine and coastal ecology specialist for ARC, told us that any sediment run-off from these areas would discharge into the open ocean near Pukenihi Point. Given that this area is relatively exposed, he opined that any effects would be minimal. This was not disputed.

[136] On the other hand, two catchments drain into the Whangateau Harbour and the Christian Bay wetland respectively.

[137] Dr Lohrer told us that the majority of the Whangateau Harbour is designated as a Coastal Protection Area 2 (CPA 2) in the Operative Auckland Regional Coastal Plan. He also noted that the southern end of the harbour directly adjacent to the proposed Omaha Park Development has the higher designation of CPA 1. The Plan states that areas with this designation are considered to be the most vulnerable to any adverse effects of inappropriate subdivision, use or development.

[138] We see two key considerations for ensuring that the Whangateau Harbour does not suffer from environmental degradation from the proposed development. The first of these is the planning and implementation of measures to control any sediment run-



off from reaching the harbour and secondly, the effectiveness of the natural self-cleansing capacity of the harbour, if, despite the sediment control measures proposed, some sediment run-off was to reach the harbour.

[139] In his evidence, Dr Nigel Clunie, an ecologist for Omaha Park described the sediment control measures proposed by Omaha Park during the land formation for the village. These are based on well accepted measures used on many earthworks projects involving similar soils throughout the Auckland region. We do not need to elaborate on these here.

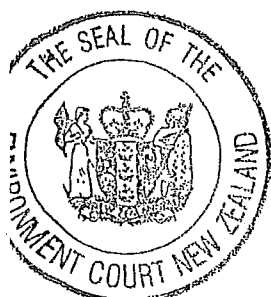
[140] The key to the success of these measures would be to ensure that they are reflected in tight and enforceable conditions of consent which are then rigorously applied by the construction contractor and the supervisory staff. We accept that it is not for us to decide on the adequacy of these measures as ultimately these must be subject of detailed consideration under Regional consenting processes.

[141] Turning to the self-cleansing capacity of the harbour itself, Dr Clunie told us that most of the tidal flats in the southern reaches of the Whangateau Harbour are sandy and that this is consistent with a long history of effective flushing of finer materials from the harbour. This includes sedimentation run-off from the extensive land clearance which has been undertaken on the existing farm.

[142] For the Christian Bay wetland, Dr Andrea Julian, an ecologist for ARC advised that this is a regionally significant wetland which is included in Schedule 1 of the *Proposed Regional Plan: Air Land and Water*. In the District Plan it is classified as a habitat of only moderate significance.

[143] Under cross-examination by Mr Young, Dr Alistair Suren, a freshwater ecologist for ARC agreed that if the farm slopes were revegetated and the water supply dam constructed as proposed by Omaha Park, there should be an overall decrease in sediment entering the Christian Bay wetland with a resultant net environmental benefit compared with the current situation.

[144] In response to Dr Suren's concerns about a possible increase in nutrient levels in the Christian Bay wetland from the disposal of treated effluent in *Policy Area 1e*, it



was Dr Clunie's evidence that the potential for this would be minimal especially with the proposed native revegetation of the affected slopes below the disposal areas.

[145] Overall, we were left with the impression that the proposed development may be able to be managed in a way which would not result in any more than a minor loss of quality in the waters of the Whangateau Harbour and the Christian Bay wetland. However, this would need to be investigated in considerably more detail than we have done during the consenting process which would follow if the rezoning was to be approved.

### *Wastewater*

[146] In respect of wastewater, there is no capacity in the Omaha Beach/Omaha Flats sewer system, and accordingly, Seaview Village cannot currently be connected to the public system. Whether the Omaha Flats sewer treatment station could be upgraded had not been explored in any depth. If that system is not available (and the applicant assumes it is not), it will be necessary to store wastewater from the village, interpretation centre and visitor lodge in the northwestern corner of the site (close to the stream into the Whangateau Harbour) and then pump it to the top of the ridge to a wastewater treatment plant to be created in the small area marked *Policy Area 2i*. Given that no detail was given in initial evidence, it was necessary to elicit details of the proposal from the expert witnesses as they gave evidence.

[147] This was a most unsatisfactory method of obtaining vital information. It appears that the intent is to treat the wastewater to a very high standard with treatment ponds installed on the ridge in the smaller area marked *Policy Area 2i* and then to pump to irrigation outlets in *Policy Area 1e*. From there sprinkler or irrigation trickle would occur to areas of enhancement planting identified as *Policy Area 1e* and the vicinity. The details of this were again vague given that issues of setback from walkways, gully heads and the like were not clear.

[148] Nevertheless, the expert remained confident that with all those constraints, there was more than sufficient area for such wastewater irrigation to take place. It appears that the irrigation would need to be checked and probably manipulated by an operator on a daily basis. Notwithstanding that the wastewater treatment and disposal



relates to urban activities, it appears to be an activity which is permitted within a rural area, subject to standards. It is not intended that the area marked *Policy Area 2i* be zoned urban, but rather remain with a rural zoning.

[149] Septic tanks or small community systems are proposed for the treatment and disposal of wastewater from individual residences in *Policy Areas 2rl* and 5.

[150] The proposed system for the collection and piping of waste water from the village, lodge and interpretation centre to the treatment plant is based on well proven technology as is the proposed use of septic tanks or small community systems for the treatment and disposal of wastewater from individual residences in *Policy Areas 2rl* and 5.

[151] At first sight the proposal to pump the waste water from the lower levels of the development for treatment and disposal at higher levels seemed to us to be counter intuitive. However, we acknowledge that the land available for irrigated disposal is likely to be restricted to these higher levels. Taken overall, while the proposed treatment and disposal system appears to us to be theoretically possible, this would need to be subject to detailed scrutiny through the consents process before the development could proceed.

### *Water Supply*

[152] Water for the residential units in the village would be sourced primarily from roof collection to storage tanks at each individual property. This supply would be supplemented with tanker supplies and if necessary with reticulated water from a storage dam/ reservoir to be built in the Water Supply *Policy Area 2i*. The reservoir, which would also service the hotel, lodge and interpretation centre, would have a surface area of up to 3.5ha based on the construction of an earth dam up to 12m high.

[153] A water treatment plant would be built near to the reservoir to provide water to acceptable drinking water standards. As well as drinking water, the reservoir would provide water for fire fighting.



[154] In addition, all residential water supplies from roof collection would need to comply with Ministry of Health guidelines for roof water. Water supply for residences in *Policy Areas 2rl* and 5 would be from roof collection supplemented as necessary by tanker water.

### *Operation of Infrastructure*

[155] Omaha Park advised that its current intention would be to engage a private contractor(s) to operate and maintain the water supply and wastewater treatment plant and disposal systems. The liability or interest of individual landowners is most unclear. Although funding was discussed on the basis of a landowner-owned company, the major users (hotel, lodge and café/interpretation centre) would have more interest in the water.

[156] We acknowledge that as the RDC has opposed the proposed rezoning, it would have been difficult for Omaha Park to have pursued in any meaningful way discussions with RDC on the alternative of the council taking over responsibility for the operation and maintenance of the completed facilities. Nevertheless, it seems to us that for the size and complexity of the proposed OPSZ development, a council provided service would be preferable and in the best interests of property owners. In the event, this is not for us to decide and our decision has not been influenced to any degree as to who might eventually provide this service if the OPSZ was to be approved.

### *Infrastructure Consents*

[157] In his closing submission Mr Green at paragraph [7.3] states that *OPL acknowledges that it runs the risk of not being able to obtain the necessary consents*. In doing so he goes on to note that the Council decision on Omaha South and states:

It is an appropriate and legitimate resource management approach to set out a set of rules in the District Plan enabling development to occur in the knowledge that some other form of consent from another agency is necessary before development can actually occur ..

[and that] ... OPL accepts this to be the case with the OPSZ. **If OPL cannot obtain the consents required for the dam, then development cannot proceed (except perhaps for the 3rl (rural-residential sites))**





[and that] ... Should OPL fail to contain the consents, the Site will most likely remain in its current state.

*[our emphasis]*

[158] We note from the bolded extract that Mr Green refers only to the consent required for the dam. In fact this should be broadened to include *all* of the Regional consents required for the proposed infrastructure.

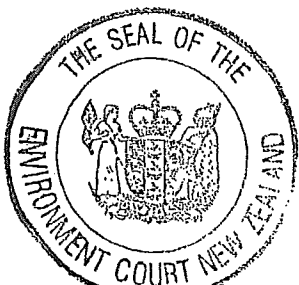
[159] We agree with Mr Green's conclusion that should Omaha Park be unable to obtain the necessary consents, then the development could not proceed even with the proposed zoning and that this would be Omaha Park's risk.

*Roading and Traffic*

[160] The formation of access roads as well as internal roads and building platforms for Seaview Village, based on the intensity of development as originally proposed, would result in around 300,000m<sup>3</sup> of cut and fill earthworks. This would include some cut slopes up to 12m high and some fills up to 6m deep within the village. We acknowledge that for a less intense development these quantities could be somewhat less.

[161] Road access would be provided from both Mangatawhiri and Takatu Roads, providing a through access between these two roads. The design of this link road could not be finalized but there appeared to be no dispute that one could be created on Omaha Park land. The impacts in terms of sediment and erosion were not discussed at any length. We shall assume a link road is provided over the site for the purposes of assessing traffic impact. The volumes of earthworks involved varied widely depending on the route and final design, but was in addition to that required for Seaview Village and was of a similar nature to the Village earthworks.

[162] As we have already noted, traffic evidence was provided by Mr Tony Penny (for Omaha Park), Mr Andrew Murray (for the District Council), Mr Tony Innes and Mr Steven Lloyd (for the New Zealand Transport Agency) and Mr John Parlane (for the Residents).



[163] We were told that the key elements of the wider roading network which would be affected by the additional traffic generated from the proposed OPSZ development were the State Highway 1 intersection with Matakana Road and Hill Street in Warkworth and the access route from this intersection along Matakana Road, Leigh Road, Omaha Flats Road, Broadlands Drive and Mangatawhiri Road. Broadlands Drive is the road which crosses the Whangateau Harbour at the entrance to Omaha Beach. Mangatawhiri Road runs more or less north/south within the Omaha Beach settlement and would provide access to the northern end of the OPSZ. Takatu Road which runs off Matakana Road would provide access to the southern end of the OPSZ with this being seen by Omaha Park as providing a positive benefit as an alternative to the Broadlands Drive access to Omaha Beach.

[164] The Residents raised concerns as to the effects of the additional demands that Seaview Village would have on parking at Omaha Beach, particularly at the boat launching ramp, and as well whether adequate levels of parking had been planned for the proposed new village.

[165] We return to these parking issues later in our decision.

[166] Mr Jeff Brown in his supplementary evidence<sup>8</sup> suggested modifications and additional provisions to the proposed Omaha Park zone objectives, policies and rules to ensure that the wider roading network would continue to have sufficient capacity to accommodate the additional traffic which would be generated by the OPSZ.

[167] In brief, these included:

- *An Objective*

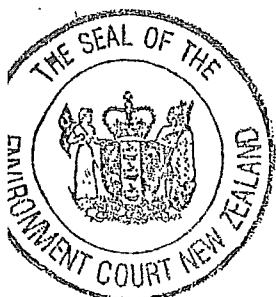
Development that can integrate with and maintains the safety and efficiency of existing transport access;

- *A Policy*

To require that roading access to and within the Zone is adequate, convenient, safe and efficient for all users including vehicles, cyclists and pedestrians and to require adequate, safe and efficient on-site car parking within the Zone; and

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<sup>8</sup> 26 February 2010



• *A Rule*

No new buildings to be constructed in *Policy Area 4v* until:

- Road widening works at the southern end of Mangatawhiri Road, for a distance of 300m north from the OPSZ, to provide a 9m wide carriageway (except where such width could impact on existing midden burial sites) are completed;
- Upgrading works of State Highway 1 and the intersections of Woodcocks Road, Whittakers Road and Hill Street are completed;
- No more than 300 residential units shall be constructed in *Policy Area 4v* until the Puhoi to Wellsford section of the State Highway 1 motorway, or part of that section that constitutes a bypass of Warkworth is completed.

[168] We note that these provisions do not identify any specific rule related to the upgrading of the access roads from Warkworth to Omaha.

[169] Mr Steven Lloyd who is the Integrated Planning Manager for Auckland and Northland for the NZ Transport Agency (NZTA) gave evidence on the current NZTA programme for highway improvement works within Warkworth which he advised should be completed by 2012.

[170] He also noted that funding had been allocated for the *investigations and design phase* of the proposed Puhoi to Wellsford Bypass with this work expected to take around 5 years to complete. He disagrees with the statement in Mr Penny's primary evidence that the *construction* of the bypass is expected to be completed within the next 5 years.

[171] The NZTA had engaged Tony Innes to advise on the traffic impacts of the OPSZ on the state highway network through Warkworth.

[172] In his evidence, Mr Lloyd refers to Mr Innes conclusion that, even with the completion of the Hill Street intersection upgrade, the OPSZ as originally proposed with an 800 unit village would have the potential to have a significant adverse effect on the network especially at the Hill Street intersection.



[173] In his Supplementary Evidence, Mr Innes responded to the effects on traffic in Warkworth from the reduced OPSZ proposal offered by Omaha Park during the hearing. In simple terms he notes this as being an 80-bed hotel, with an initial 300 residential units followed by a further 200 units (to give a total of 500 units).

[174] Firstly, *for no bypass* in place, he describes the four scenarios he used for modelling the afternoon peaks in 2021. These are for the full 500 unit development as well as for a 300 unit development each with a low trip and a high trip generation. In Mr Innes's view, the delays in traffic at the Hill Street intersection resulting from the 500 unit high trip scenario would result in unacceptable adverse effects. Conversely, the delays under a 500 unit low trip scenario would be acceptable.

[175] For the 300 unit scenario, the delays which would result at the intersection from both the high trip and low trip scenarios would be acceptable as would the 500 unit scenario with the bypass in place.

[176] Mr Innes' overall conclusion was that the reduced proposal with Mr Brown's proposed staging Rule would not result in significant adverse effects for traffic passing through Warkworth. We accept this conclusion on the basis that Omaha Park adopted Mr Brown's proposed Objective, Policy and Rule as set out above.

[177] There was a significant difference of view between Mr Penny and Mr Parlane on the effects of the additional traffic which would be generated by the OPSZ on the roads between Warkworth and Omaha Beach. Primarily, this related to Mr Penny's view that these effects should be evaluated against peak hour traffic counts based on an *average day* whereas Mr Parlane considered that the evaluation should be against peak hour traffic based *on a peak day*.

[178] In support of his position, Mr Parlane argued that there would be at least 50 days in a year where the traffic volumes were in excess of twice the average daily volume, these days being the last 7 days in December, the 31 days in January, the 8 weekend days in February and the 4 days of Easter. This would total just under 15% of the days in a year or around the 85 percentile value commonly adopted in the design of roads.



[179] Mr Murray in his supplementary evidence also addressed the traffic impact on the access roads from the reduced scale OPSZ development. It is his assessment that in the predominant travel period from 7am to 7pm over the high season (the 3 weeks from 28 December to 10 January) the modified OPSZ could result in a reduction of around 26% in average speed on the access roads during day time hours.

[180] He notes that the capacity of the access roads is generally driven by the general road alignment and carriageway width with Matakana Village being a particular constraint during peak times. Along these access roads there is a general lack of passing opportunities with capacity being governed by the speed of the slowest vehicle. Any relief to these capacity and speed constraints would require shoulder widening and the provision of passing lanes over extended lengths of road as well as an upgrade to the Matakana roundabout. Mr Murray advised that he was not aware of any RDC plans for such upgrades.

[181] Mr Murray has also compared the effects of the traffic growth arising from the OPSZ with those from the existing ECRZ concluding, not unexpectedly, that the revised OPSZ provides inferior outcomes to the ECRZ.

[182] Despite his differences with Mr Parlane and Mr Murray on the traffic volumes to be used in the assessment of the capacity of the existing access roads, Mr Penny does agree that some upgrading would be required. For example he notes the need to widen the section of Mangatawhiri Road nearest to the OPSZ from its existing 6 metres (as addressed specifically in the Rule proposed by Mr Jeff Brown) and that sections of the main access roads closer to Omaha could also require improvements if the OPSZ was to proceed.

[183] Mr Murray is also of the view that, if the Court was minded to approve the zone change, the extent of any such upgrades required to mitigate the effects of the OPSZ could be of sufficient magnitude as to warrant their specific identification ahead of any approval being given, with this to include agreement on Omaha Park funding contributions for the upgrades.



[184] For our part, we are satisfied that with some upgrading to retain the level of service, the existing access roads should be able to accommodate the extra traffic generated from the reduced OPSZ development.

[185] Given that certain activities, including commercial development, are proposed as permitted in Seaview Village, we must assume that these traffic impacts are appropriate for all permitted activities. We cannot conclude what other improvements might be required to maintain level of service on existing access roads or what the financial contributions, if any, should be. We intend to proceed on the assumption that the provisions of the zone can be further considered in relation to both these issues if otherwise appropriate.

[186] Mr Brabant raised issues relating to parking provisions in Seaview Village with Mr Penny. No detailed evidence appears to address this but we assume parking for the hotel and commercial areas would be on the same basis as similar urban areas. A new objective inserted by Mr Brown to provide:

... adequate, safe and efficient carparking within the zone

reflects this. This would need to be borne out in appropriate rules/development standards, or as a matter for discretion at consent stages.

[187] Whilst there is a walkway proposed from Seaview Village to the beach, Mr Parlane questioned whether some persons of frail disposition or families with young children would choose to use this walkway given its steepness and length (around 1 km). Instead, it is his view that these residents would be more likely to drive to the beach thereby adding to the demand for parking there.

[188] While this might well be the choice that some OPSZ residents might make, we heard no evidence on the numbers who might elect to make such a choice. In addition, in his evidence Mr Parlane noted that Omaha Park had not completed any analysis of the *overall* frequency and numbers of OPSZ residents who might choose to drive to use the facilities at Omaha Beach.



[189] During cross examination, Mr Brabant pointed out to Mr Penny that when Mr Parlane had visited Omaha on 2 January 2010, the boat ramp parking was full to over-

flowing. Mr Penny responded that it was not typical practice to design car parking to accommodate demand on the busiest day(s) of the year. During his visits to Omaha on January 6 and 7, 2010 for example, while he did not count the total number of parking spaces, he did observe a number of empty spaces in the area adjacent to the boat ramp.

[190] Mr Penny also noted that there was a proposal to upgrade the Point Wells boat ramp and that if this was to be completed it would most likely attract a number of users who currently launch from the Omaha Beach ramp and in doing so ease the pressure at Omaha.

[191] Given that we did not receive any definitive information on the potential effects of the OPSZ development on parking at Omaha Beach, we are unable to reach firm conclusions on impact on the boat ramps and beach parking.

[192] We have concluded that these effects need to be addressed by amending development standards or including discretions for resource consents. Thus the zone provisions would need redrafting.

[193] On this basis we do not see the effects of traffic generated from (a reduced) OPSZ development as being determinative for us in deciding whether the OPSZ plan change appeal should be upheld or declined.

### **Conclusions on Infrastructure**

[194] Having considered all of the evidence relating to the proposed infrastructure, it is our view that there is some uncertainty that Omaha Park would be able to obtain all of the necessary consents. However, *on its own*, we do not see this uncertainty as being determinative of whether OPSZ or ECRZ zoning is more appropriate.

[195] We consider traffic effects might be adequately addressed by new controls inserted in the zone provisions. Impacts of the new road construction and provisions for parking and access tracks both to and along the coast would require significantly greater detail. This may require an expanded and detailed Comprehensive Development Plan and/or additional controls or discretions on resource consents. It may also require further consideration of the Status of Activities in Seaview Village.



## Other Matters

[196] As well as infrastructure, other matters of concern relate to:

- [a] Indigenous vegetation;
- [b] Natural character of the coast;
- [c] Cultural matters

[197] We address each of these in turn.

### *Indigenous Vegetation*

[198] As noted earlier some 12ha of existing indigenous vegetation is to be removed from the *Policy Area 4v* lower-lying land formerly covered by the Robertson residential subdivision consent which was never utilised for residential homes. Although there will be enhancement planting within the *4v* and *4e* areas, we understand that the net gain is likely to be in the order of 12ha. This existing vegetation mainly in *Policy Area 4v* and is very well established although it is predominantly manuka. We do not agree with Dr Clunie that it has little value and agree with the Regional Council ecologist who noted that it was:

- [a] well-established and will develop to greater diversity;
- [b] that it provides significant habitat already from the swamp to the ridge;  
and
- [c] that natural regeneration will further enhance its values.

[199] We recognise that the extent to which the existing native vegetation values can be realised is currently limited by stock grazing and management practices. We are in no doubt that with a little maintenance and the removal of stock, the entire area of *Policy Areas 4v* and *4e* could vegetate quickly, particularly in the lower-lying areas. We consider that lowland vegetation is locally rarer and of higher value. Kahikatea forest to the west and wetland species in the lower area (*4v*) of the Seaview bowl show





that wetland habitat is natural in this area and can be established to a high standard. We consider the extension of the wetland species into further areas of the lowland area (4v) of Seaview Village is better in terms of achieving the objectives of the Plan than its use for housing.

[200] This does not mean that no housing could be established there, but we consider that such housing would be significantly more limited than that proposed by the applicant. We conclude that the objectives of the ECRZ rather than the OPSZ create a higher likelihood that these enhancement outcomes will occur in *Policy Area 4v*.

[201] Hubbards Bush is currently unfenced. Under the ECRZ edge effects could continue to compromise it. Other wetlands and native vegetation is currently compromised by grazing with little fencing out of such areas. This could continue under ECRZ.

[202] Overall, under ECRZ enhancement and improvement is unlikely unless the owners seek to develop the land. If they do then similar outcomes to those preferred in OPSZ could be achieved as conditions of consent without the density of development proposed in the OPSZ. OPSZ does not guarantee a better outcome because the OPSZ zoning does not require any change from the current farming practice. Although encouraging development as set out in the OPSZ, the provision cannot and does not require development to occur. For example, it is unclear how much protection of Hubbards Bush would occur if only the 2rl land was developed.

[203] Annexed hereto is Mr Brown's last iteration of the Special Zone provisions marked F. Rule 12.8.29.9.3 of Mr Brown's revised proposals for OPSZ require protection of *Policy Areas 1bp, 1cw, 1fw, 1e* and *4e* on subdivision of Seaview Village (4v). Although conservation development plans are required for *Policy Areas 2rl, 3, 5* and *6* (Rule 12.8.29.9.5) the existing and enhancement vegetation appears to be only within the Policy Area. In *Policy Areas 5* and *6* there is a reference to Hubbards Bush, but in relation to areas to be managed for ecological enhancement within *Policy Areas 5* and *6*. Accordingly, no direct provision for Hubbards Bush (for example) need be made in *Policy Areas 5* and *6*.



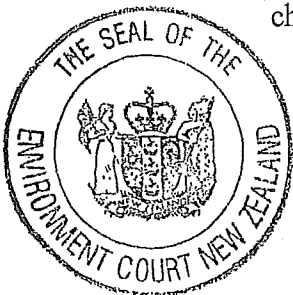
[204] It is at least arguable that development could occur in a piecemeal way without ever protecting Hubbards Bush or the Coastal forest in front of *Policy Areas 6 or 1cw, 1fw and 1e* if Seaview Village was never developed. To that extent the separation into Policy Areas might mean less certainty of protection if Seaview Village is not developed.

[205] On the balance of the property the protection of Hubbards Bush, and possibly its fencing for any development of Seaview Village, is a more immediate benefit of OPSZ. Similarly, the area identified for additional protection and more enhancement may achieve a cohesive revegetation with Hubbards Bush in the longer term if Seaview Village is developed. With the proximity of Hubbards Bush to the Regional Park, such an enhanced area (well over 200ha) would be a vital benefit to the region. On the other hand, the introduction with OPSZ of hundreds of people into the coastal and indigenous vegetation areas leads to risk of new and difference effects.

#### *Natural Character of Coast*

[206] When we look at the New Zealand Coastal Policy Statement we agree that the natural character of the coastal environment has been modified. Nevertheless, there are still significant natural features and processes which are evident. Te Kie Point and Pukenihihi Point are examples, together with the coastline between these two points. It can be seen that replanting of areas such as to the northeast of the Ching property have significant consequences in terms of the public perception of the naturalness of the coastline. Whilst we recognise the preservation of Te Kie Point as being important, we consider that having an interpretation centre/café on the flanks closest to Omaha Beach derogates from its value. In our view, a building in the saddle area between the Ching property and the headland is more appropriate and in keeping with the coastal nature of this area.

[207] The coastal forestry near *Policy Area 6* is of national significance under both Sections 6(a) and 6(c) of the Act. Although public access along the coast is a matter of national importance under Section 6(d) of the Act, the preservation of national character of the coastal margins is also of similar importance (Section 6(a)).



[208] Between Tarawharanui Regional Park and the Omaha Beach, the naturalness of the coastal edge is particularly important. In *Policy Area 5*, the pine trees and farming have effected some modification to the coastal area but it is still largely unpopulated (excepting for the houses near Pukenihihi Point and the Ching house). Outcomes under ECRZ or OPSZ could be similar, and accordingly, we assume either zone has as its objectives achieving these important Part 2 outcomes.

### *Cultural Issues*

[209] Although cultural evidence was given for the applicant, this essentially proposes that further investigation should be undertaken. There appears to have been an assumption that a New Zealand Historic Places Trust consent could be obtained to destroy and modify archaeological finds. In our view this does not address the cultural issues that arise, but rather the archaeological ones.

[210] There is no doubt in practical terms that there are several pas in the area, one of which is Te Kie Point. Te Kie Point also constitutes an important landmark as one of the marker headlands for Omaha Beach. We do not accept a 50m setback for the pa itself as an appropriate cultural setting for this pa site and the headland in the context of this district.

[211] We conclude, the whole of the western side of Te Kie Point is important to understand the cultural context of the Te Kie Point pa, as are the rearward flanks (those facing the wetland area). Given the association with the wetland, we conclude that Te Kie Point is part of a unit which forms both part of a landscape and cultural unit, as a bookend for Omaha Beach, and as a context in which the relationship of Maori with both the ocean and the Whangateau Harbour can be viewed.

[212] We accept that the area to the east of the headland including the saddle with the Ching property is of less cultural importance, although the question of preserving access to the small beach in that area is of some moment. Nevertheless, we conclude a 50m setback for development from the pa site itself is too little. Visional connections to the west to Omaha Beach and to the south to the wetlands are impacted. We would have thought total protection of the western and (Omaha Beach) southern (wetlands)



are required. Any development on the eastern side would need to be in the saddle area well away from the Pa site.

[213] In respect of the balance of the coastal area, the cultural relationship of the area with Maori was acknowledged, particularly the battle at Pukenihi Point. For our part we consider the placement of *Policy Area 6* so close to the coastal forest in that area and close to an area where we understand there may be koiwi to be unwise. Given the other problems we have already identified, we consider that any consideration of a lodge in this area should be considered as a stand-alone consent so that all aspects of this can be considered in a detailed way.

[214] Without being determinative of the zoning as an issue, an application under the ECRZ rules would enable a proper consideration of all the elements that are relevant to a determination of such a use of this site. We cannot see any reason this area should be zoned as *Policy Area 6* rather than, for example, the area immediately adjacent to the existing housing or the existing farm. While screening considerations from the regional park would be relevant in this alternate area, these are not insurmountable.

### **A Comprehensive Plan Approach**

[215] It is clear that Omaha Park cannot achieve the outcomes it seeks, at least in respect of Seaview Village within the context of the existing ECRZ provisions. With the exclusion of the Seaview Village, many of the objectives of Omaha Park for *Policy Areas 1, 2, and 5* could be achieved within the ECRZ.

[216] Under ECRZ *Policy Area 6* would require a non-complying consent as would the establishment of an activity information centre/café on Te Kie Point *Policy Area 3*. Interestingly, no special provisions have been made for public coastal accessways within the OPSZ provisions, although the expert witnesses acknowledged that that would inevitably be required as a result of any development.

[217] It would certainly be required as a condition of any development under the ECRZ and it would be important that it be acknowledged in any OPSZ provisions that coastal access would inevitably be required. For current purposes we shall assume



that such provisions would be provided, although this would need to be made explicit within the OPSZ area if the proposal is otherwise appropriate. We should point out that this would include both the Whangateau Harbour estuary as well as the coastline.

[218] Mr Brown's last proposed provisions for the OPSZ (annexed as F) are extremely extensive and it is not our intention to paraphrase them. Nevertheless, it appears to us that the following key points can be made. The difference between the ECRZ and the approach of the Omaha Special Zone can be seen in the issues provisions proposed. Essentially there is an emphasis in OPSZ on several things:

- [a] Residential opportunities;
- [b] An overall or net environmental benefit approach;
- [c] Certainty of outcomes, particularly the potential to enhance native vegetation.

[219] The first significant concern we have concerning these provisions is that they do not rely on the paradigm of the Proposed Plan which creates a clear dichotomy between rural and urban activities. There is obfuscation of the two in the OPSZ provisions with a clear trade-off between the residential development and urban focus for the enhancement and preservation of existing native vegetation.

[220] This is nowhere clearer than dealing with the treatment of the area known as *Policy Area 4e* which is the greenbelt around Seaview Village. Is *Policy Area 4e* intended to be part of the urban area or part of the rural area? This led to questions from the Court as to who was responsible for the management of this and other large land areas including the water collection and wastewater areas.

[221] We are curious as to why the applicant has adopted such a different approach to that, for example, adopted for the Omaha South Special Zone. We recognise that there are distinctions, the major one being that most of the land in this case is in fact intended to remain Rural. Nevertheless, the OPSZ speaks of the Policy Area rather than addressing it in terms of the dichotomy within the Plan. This on the face of it appears to create a third categorization of land, which is neither Urban nor Rural and is treated as one unit for the purposes of the Plan.



[222] If that is the case, we have an immediate concern that whatever areas are originally zoned for Seaview Village could be expanded upon or changed in the future. Several examples which concern us involve the ECRZ land trapped in small pockets in the midst of OPSZ (i.e. the Ching, Abraham, Tunnicliffe, Mitchell land), and the land to the immediate west of the site Smith & Hardy.

[223] Development of areas such as the lodge in *Policy Area 6* and cluster housing in *Policy Area 5* could easily be argued to be Urban in nature and therefore subject to further expansion and intensification, especially if connected to the central water supply and sewer. The OPSZ statement is unclear, both as to its categorisation and how any of these potential changes could be avoided.

[224] This makes the application of the Rodney Proposed District Plan residential or urban provisions difficult of application in this case. There is no doubt that development onto the slopes facing Tawharanui Regional Park would be a clear example of inappropriate urban development. The applicant has not suggested that this area could be Urban, yet the OPSZ Statement is unclear as to its exact status.

### *Urban and Rural Land*

[225] From this we have clearly concluded that any Rural areas need to be incorporated within the ECRZ. If there is a special area overlay, it would overlay the general ECRZ principles. Any other approach would give rise to the gradual undermining of the boundary distinction by modification to the Special Zone provisions over time. We have concluded that *Policy Area 3*, its associated *Policy Area 2rl* and two other areas including *2i* areas should clearly be included as part of the ECRZ. At best therefore the applicant can argue for some particular modification or development rights that would apply to this land as a Special subzone. That approach has been adopted in other areas of the District. Accordingly, in principle this does not mean that the OPSZ need fail, but it would need to be modified at best to be an overlay on the ECRZ for all areas except *Policy Area 4v* and potentially *4e*.

[226] One of the major problems that this Court has had is trying to ascertain what is an appropriate zone for *Policy Area 4e* (Seaview buffer zone). In the end it appears that an urban zone would provide for open space as an urban zone, and accordingly, in



the event that a Special Urban Zone was applied to *Policy Area 4v*, an open-space zone could be applied to *Policy Area 4e*. Again, special provisions would need to apply. Given our view in respect of the Rural zoning, it follows therefore that at best it seems that the applicant could seek a Special Urban Zone applying to this land with *Policy Area 4v* having some special residential status (Residential Omaha Seaview) and the *4e* area constituting Open Space with special provisions applying to it.

[227] Having reached that conclusion we then come to consider whether there are other areas within the OPSZ to which an Urban zone other than Residential should apply. We have concluded that in the event that development was appropriate, a central corridor would need to be maintained essentially between the Tunnicliffe, Mitchell property and the wetlands below. This would require a minor, but nevertheless important realignment of the central corridor more closely with that of the existing gully system as Open Space. We do not understand that Open Space zoning would in itself prevent construction of roads, but special provisions may need to be introduced to that end.

[228] Having discussed in general terms the framework of the OPSZ, it can be seen that major re-drafting would be required in order to make it fit in with the rest of the Plan and with the Court's conclusions as to appropriate Urban/Rural approach and framework. Nevertheless, the core issues would remain as to whether, within the remaining area of *Policy Area 4v* not included in the open space:

- [a] An urban residential housing of medium or high density is appropriate; and
- [b] Whether the other provisions in relation to Rural Areas an ECRZ overlay for *Policy Area 6*, cluster housing in *Policy Area 5*, and the *2rl* are appropriate.

[229] It can be seen that overall, the difficulty with the approach the Court considers must be adopted is that it does not easily allow for some of the trade-offs to be made in as transparent a fashion as was intended under the OPSZ provisions. For example, it is intended that Hubbards Bush constitute a trade-off not only for the cluster housing in OPSZ subzone *Policy Area 6*, but also in part for the urban zone of Seaview



Village. Similarly, the significant enhancement of some 210ha throughout the balance of the area is intended to compensate for the development generally both in urban Seaview Village and the rural areas elsewhere, but also to provide a green buffer and boundary reinforcing the 4v area. It is essentially a comprehensive development plan approach trying to fit within a plan which adopts a dichotomy between Urban and Rural areas.

*Preserving Features, Landscapes, Character and Amenity*

[230] Having established the relevant provisions and shape of the ECRZ provisions and the OPSZ provisions, we now come to consider the undisputed provisions of the ARPS and Regional Plans, the New Zealand Coastal Policy Statement and other superior documents.

[231] The Land and Water Plan, the New Zealand Coastal Plan, the ARPS, and the District Plan, all point in the same direction. They seek to preserve the distinctive features and landscapes, the rural character and amenity values of the area. Omaha Park argue that their provisions better achieve that by the significant compensatory provisions including:

- [a] The preservation and protection of Hubbards Bush (this may even include predator-proof fencing around it);
- [b] The replanting with native vegetation and enhancement of the vegetation up to and over the ridge line to reinforce the existing landscape character of the area already recognised in part as outstanding;
- [c] The provision of access through the area. As we have already held, we would require it to provide access to and along the coastline also, and had assumed that that would be provided if the changes were otherwise appropriate; and
- [d] Preserving Te Kie headland, although not at its flanks, in perpetuity.





[232] The question for this Court is which of the two sets of provisions as we have described them would better provide for the landscape values, character and amenity values. Although we acknowledge that OPSZ provides for more certain outcomes, at least if Seaview Village is developed, it also provides for more certain effects. Those include buildings significantly further up the slopes of the escarpment than was suggested to us in the evidence-in-chief of the witnesses. In some areas this may even exceed the height of the ridge itself, particularly at the western end of *Policy Area 4v* and at the southeastern saddle near the Abraham property.

[233] Overall, it would sit above and be distinct from the Omaha Beach settlement. That in itself is not necessarily fatal, given that the beach community is focused towards the sea. We consider that the concept of dominating overviews is significantly exaggerated in respect of Omaha Beach. However, when we combine this topographical change with the difficulties of maintaining the hydrological neutrality given the non-permeability of the soils, removal of existing indigenous vegetation and ecological habitat on the lower-lying areas, the visual encroachment around the wetland of built development, we are concerned that the gains are more apparent than real.

[234] We are in no doubt that development of the 4v Seaview Village area under the ECRZ provisions would involve significant protection of indigenous vegetation, enhancement of that which is existing and further planting upon the ridges to reinforce existing vegetation. The mere removal of stock is likely to have a significant beneficial effect on the native bush in the medium to long term. Thus we have concluded that although the effects of the OPSZ development are not as significant as is suggested by any of the witnesses opposing, neither are the benefits as great as suggested by the applicant's witnesses.

[235] We then consider a number of unknowns including sediment control to Whangateau Harbour (a highly sensitive ecological environment where any failure could have significant consequences), the need to control wastewater including pumping it a considerable distance, treat and irrigate it, and the need to control water, and begin to see a range of complexities entering into the proposal. Each of these areas require resource consents from the Regional Council which may or may not be forthcoming. Mr Green suggested that we should not refuse the rezoning based on the



fact that the applicant may never be able to utilise the rezoning if it could not obtain the other consents required. We agree. However, what these issues do demonstrate is the difficulty of achieving the density of development anticipated by the applicant.

[236] We add also the questions of vehicle access, both for the Takatu Road extension where the impacts of that roading system are not at this stage clear to the Court, and the need for access for the construction of both the dam, the wastewater treatment plant, the irrigation systems, and the like.

[237] We cannot be satisfied at this stage that the outcome in landscape, character and amenity terms will be as satisfactory for OPSZ as the outcomes anticipated under the ECRZ where areas can be retired entirely from use and maintained by the owner in the future. We must keep in mind that many of the requirements for the maintenance of dams, wastewater treatment, ongoing maintenance of enhancement planting are both costly and time consuming. Landowners of properties within the village may not have the same interest in maintaining the standards as an individual land owner would have where they are able to undertake a reasonable level of work themselves.

#### **Which Zone is Better?**

[238] We have briefly mentioned many of the other superior documents, particularly the ARPS and the NZCPS, and there are others including the Hauraki Gulf Marine Park Act and the Regional Land and Water Plan, which provide parallel or repeating provisions similar to those already discussed. The relevant issues of these documents are reflected in the Objectives and Policies of the Proposed District Plan and in either set of provisions which are generally consistent with the superior documents. The exception to this is the Regional Council's concern as to whether the Seaview Village as a new urban area complies with the requirements of the ARPS. We have discussed this issue at length and concluded that it would meet the requirements of the ARPS.

[239] Accordingly, the issue is which set of provisions (as modified during the hearing and by the Court) is more appropriate under Section 32 of the Act, or better?



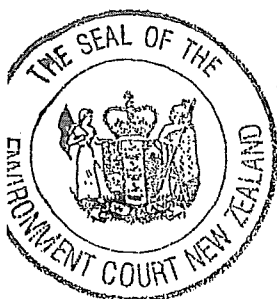
[240] Working through the various categories discussed in *Eldamoss*<sup>9</sup> and *Briggs*<sup>10</sup>, we discuss the provisions as follows:

***Assist the Council in Performing its Functions***

[241] The objective of the provisions of the ECRZ and OPSZ is to assist the Council in performing its functions. Given our conclusion as to the way in which the OPSZ would need to be incorporated as effectively an overlay on the urban/rural proportions, we consider that both mechanisms could achieve the outcomes of the Act and the Plan with appropriate wording. In practical terms, the difficulty in this case is which better achieves those purposes. Given our conclusion that the appropriate emphasis for this area is the natural rural character and amenity, it follows that the provisions of ECRZ better meet those requirements. We are further concerned at the technical complexity of fitting this comprehensive development within the framework of the urban/rural provisions of the Plan.

***Part 2 of the Act***

[242] Again, the emphasis of the Plan, reiterating Part 2 of the Act, is on the natural character of the landscape both from indigenous vegetation and the coastal processes. Section 6 of the Act particularly recognises such natural character under Section 6(a) and other elements such as indigenous vegetation under Section 6(c). Given the existing absence of significant physical development, it can be seen that the ECRZ provisions better recognise the natural character elements and processes given the different emphasis under the OPSZ provisions. Nevertheless, we acknowledge that the OPSZ provisions do intend to achieve improvements to natural character and particularly indigenous vegetation through both protection of Hubbards Bush and the enhancement of other native areas. Accordingly, it can be said that both seek to achieve these outcomes by differing mechanisms. One as a trade-off for urban development; the other requiring any development to make at least partial provision for those elements.



<sup>9</sup> *Eldamoss Investments Limited v Gisborne District Council*, W47/2005

<sup>10</sup> *E M Briggs & Ors v Christchurch City Council*, C045/2008, 24 April 2008

[243] Further, it can be argued that outcomes under Sections 6(c) and 6(d) of the Act (and even under Section 6(e)) are more certain under the OPSZ provisions. The OPSZ outcomes can be prescribed to occur either prior to or as a consequence of development of Seaview Village. Under the ECRZ such outcomes could only occur in respect of individual landholdings when that particular title is sought to be developed.

[244] If no development occurs then active protection of cultural or natural areas (i.e. Te Kie Point and the coastal forest near *Policy Area 6*) may not occur. In determining which outcome is better however, we take into account that the OPSZ would introduce significant population and physical changes to the environment. Currently the natural character of the area is protected by lack of development and private land ownership excluding public access. Thus the ECRZ at least preserves options under the Act by maintaining the status quo.

[245] Accordingly, it is not a simple matter to determine which outcome is better in achieving the Act's purposes. The Proposed Rodney District Plan considers that residential development is the main threat to the natural character of the ECRZ. The Plan allows farming and forestry as permitted activities even though they occur in sensitive environments. The Plan therefore progresses on the basis that provisions which avoid residential development in existing rural areas better achieves the purposes of the Act.

[246] We conclude on balance that the ECRZ outcomes are better in achieving Part 2 objectives in particular, as viewed and interpreted by the local population in its District Plan.

*Does it achieve and implement the objectives and policies?*

[247] As proposed, the OPSZ has some particular problems, given that it does not operate from the Proposed Plan dichotomy of urban and rural. To that extent, the ECRZ fits directly with the overall philosophy of the Plan and better achieves the Plan objectives.

[248] Nevertheless, as we have discussed, it is possible that the OPSZ provisions could be changed to effectively form an overlay within each of the urban and rural



areas. However, the emphasis of the ECRZ on the rural character and natural character of the coastal area is more consistent with the Rural objectives of the Proposed Plan than the OPSZ which essentially provides for development within areas of natural indigenous vegetation and close to the coast.

[249] We agree that the net environmental benefit approach of the OPSZ is a valid approach. Nevertheless, we consider that the ECRZ approach is better in the circumstances of this case in recognizing the dichotomy between urban and rural zones. Accordingly, the ECRZ better achieves and implements the Objectives and Policies of the Proposed District Plan which is founded on the fundamental division between Urban and Rural.

*Efficiency and Effectiveness of the Provisions in Achieving the Objectives and Policies*

[250] The broader purpose of the Proposed Plan is essentially encapsulated within provision 4.5.2.4. That provision would be applicable whichever zoning approach the Court took. This provides:

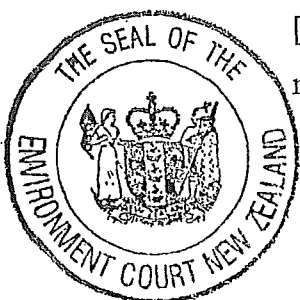
The protection of the particular special character in particular parts of the District is a key direction. There are some areas, particularly coastal areas, which provide Rodney with a unique character. Retention of these particular characteristics is achieved through the application of the zones with a suite of controls including limiting activities to non-urban, less intensive activities and imposing sub-division rules.

[251] In 4.5.3.3 it is noted that:

Residential zones are not applied where the intensity of development detracts from existing natural character, or areas of high landscape quality, or where the natural character of coastal areas would be adversely affected by such development. Generally no new residential zones are applied, where adverse effects on the abovementioned elements would occur.

[252] When we come to look at the efficiency and effectiveness it cannot be said that providing for urban development when the general policy and objectives seek non-urban, is efficient or effective in achieving those objectives.

[253] Whilst we have not regarded those effects as particularly significant, there are nevertheless effects on natural character i.e. loss of indigenous vegetation, the



character of the coast, views to and from the coast, and impingement upon the high quality landscape being the ridge edges particularly in those areas where the height of some buildings may approach 45RL.

[254] Whilst we acknowledge that there is uncertainty as to outcomes with the ECRZ provisions, they are overall more efficient in achieving the objectives and policies because of the necessity to consider every development on a case by case basis.

### *Benefits and Costs*

[255] We do not dispute that there is demand for coastal land. Although this land would not be generally as desirable as that immediately on the coast (such as Omaha South), there is nevertheless likely to be some demand for it. To that end one could say that the market is an efficient determinant of benefits and costs. On the other hand, the Act is not concerned only with economic benefits and costs but must consider broader issues which are not readily valued in a strict economic sense (i.e. views).

[256] Rural character and amenity are ephemeral issues which are at the heart of the Rural Zone provisions in this Plan. The broader provisions for urban containment and those of the Proposed Plan clearly seek to benefit various sectors of the local and regional community. As in all cases, providing for development at Seaview Village would enable certain portions of society, while at the same time disabling to some extent other various portions of society and the environment.

[257] There was evidence given that there was not sufficient coastal land being provided within the Plan and that this would lead to suppressed demand and perhaps over pricing. That appears to be a cost which the Regional Council is prepared to bear as is the District Council in general terms. Essentially that coastal development issue for the District Council has been resolved in favour of management and control over enabling. The reasons for that relate to the continual demand for subdivisional land in the coastal area and the consequential compromises to the environment we have discussed in respect of the ECRZ particularly.



[258] There is very broad and strong opposition from the existing residents at Omaha Beach and from the Regional and District Council. That demonstrates, if nothing else, that there is a broad range of views as to the benefits and costs of this proposal. We acknowledge Mr Green's point that there is to some extent an attempt to *pull up the ladder* within the existing development. On the other hand we must recognise that there is a balance to be struck in this case between benefits of residential development and the benefits of rural character, amenity and landscape.

[259] We could reframe our conclusion in this way:

- *The certainty of the RMA outcomes*

We acknowledge that the ECRZ is less certain in its outcomes because the outcomes that might occur cannot be listed at this time. Nevertheless, we have concluded that the ability to assess appropriate outcomes on a case by case basis is likely to achieve better outcomes in terms of the Plan and for natural character and amenity than a comprehensive development zoning.

- *Defensible Urban/Rural Boundaries*

The difficulty with the OPSZ proposal is that the dichotomy between Urban and Rural was not clear. Although the OPSZ could be reframed in such a way, it is still difficult to know how the OPSZ would provide and reinforce a defensible Urban/Rural boundary. Using the Seaview Village ridges would be a necessary element of the OPSZ Urban/Rural boundary. Allowing development up to 45RL around those ridges would, in our view, significantly compromise its status as a defensible boundary. At the current time, a boundary exists between the wetland area just to the south of Omaha South and the basin ridge. Although there are several compromises in the forms of houses within it, it nevertheless forms a substantive boundary of some 100ha. If a lower height on the ridge were adapted (say, maximum height of buildings of 25RL), this would most likely compromise the village to such an extent as to make it impractical. Moreover, we have insufficient evidence to conclude whether such an approach would be a sufficient defensible boundary.

- *That the Act is not risk-free*



We agree entirely with Mr Green that the Act does not envisage that there will be no risk whatsoever. In this way we have not gone deeply into elements of the potential sediment failure to the Whangateau Harbour, wastewater failure, or the risk of failure of the dam (to the Whangateau/Christian Bay). Quite simply, the proposal has not advanced to a point where we could assess that risk, nor is there any occasion for us to do so given that consents are required from the Regional Council. We have concluded that those matters could be addressed through the resource consent processes and can be put to one side for current purposes beyond a broad discussion of the intentions in relation to them. For the same reason we have concluded that the fact that water, wastewater and discharge consents might not be obtained at all, is a matter that we need not concern ourselves unduly with at this stage. Although they constitute complications to the development, they nevertheless do not prevent us considering the zoning.

[260] Nevertheless, the introduction of a significant population into sensitive areas carries with it a whole series of risks which could compromise the natural character of the area. Some mentioned were pet predation, fire risks, pollution risk and the introduction of weed species. An ECRZ zoning also carries risks particularly relating to stock incursions into Hubbards Bush and in and around wetlands and native vegetation. Forestry involves significant collateral damage at harvest from roading, felling and cut waste and could compromise native vegetation.

[261] In deciding on the better plan provisions, we must account for such risks in a realistic and robust way. However, that conclusion is in the end a value judgment based upon the Act, superior documents and Proposed Plan Objectives and Policies. Here the Proposed Plan sees the risks of farming and forestry activities as acceptable whereas those related to residential require closer scrutiny.

### Outcome

[262] As a matter of general principle, we have concluded that the Seaview Village is not an appropriate development in this area. Although we consider that the matter





can be considered on the merits and have done so, we have reached the same conclusion in respect of the project as a whole (including Seaview Village).

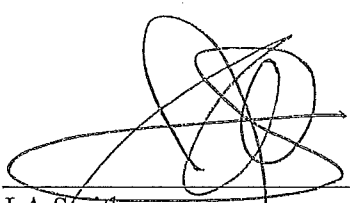
[263] As a matter of principle, the approach of net environmental benefits is an appropriate tool within the RMA process. The particular difficulty in this case is the clear separation in the Rodney District Proposed Plan between Urban and Rural zones and the lack of evidence as to how that dichotomy would be achieved and maintained by the OPSZ provisions. There are a number of significant issues in relation to Seaview Village itself which makes any urban use in this area inappropriate and the area's continued zoning as ECRZ a better outcome in terms of the Act.


[264] Accordingly, we confirm the provisions of the District Plan as promulgated as a result of decisions and amendments on appeal as they relate to this area, and disallow the appeal of Omaha Park for the reasons we have stated.

[265] We consider that the case was appropriately presented and that all parties argued the case concisely. Applications for costs are not encouraged. Notwithstanding, any application for costs is to be filed within 20 working days, replies within 10 working days, and final reply (if any) 5 working days thereafter.

**DATED** at Auckland this 2<sup>nd</sup> day of August 2010

*For the Court:*

  
\_\_\_\_\_  
J.A. Smith  
Environment Judge

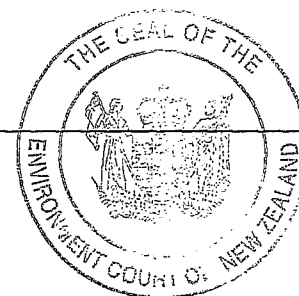






# OMAHA PARK OUTLINE PLAN POLICY AREAS SETOUT PLAN

- Mangatawhiri Road -  
& Takatu Road  
OMAHA



Denotes marked position on-site  
with steel waratah and flagging tape

Denotes marked position on-site  
with steel waratah and road cone



Total Area : 650.8 ha

Scale : 1:5000 (A3)

Date : February 2009



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Our Ref : 1011 - 084 - 2

Annexure

**B**

