IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 56/88





IN THE MATTER of the Town and Country Planning Act 1977

A N D

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant



AND MANGONUI COUNTY COUNCIL

Respondent



A N D

C.A. 57/88

BETWEEN TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

AND MANGONUI COUNTY COUNCIL

Respondent

Coram: Cooke P.
McMullin J.
Somers J.
Casey J.
Bisson J.

Hearing: 2, 3 and 4 May 1988

Counsel: G.P. Curry and P.F. Majurey for Environmental Defence Society Incorporated
Sian Elias Q.C. and Denise Bates for Tai Tokerau District Maori Council
P.M. Salmon Q.C. and P.A. Fuscic for Mangonui County Council and Doubtless Bay Development Co.
K. Robinson for Minister of Conservation

Judgment: 27 February 1989

JUDGMENT OF COOKE P.

These are appeals by leave granted by Chilwell J. from his decision reported in (1987) 12 N.Z.T.P.A. 349 dismissing appeals on questions of law from a determination of the Planning Tribunal approving (subject to amendments) the rezoning of part of the Karikari peninsula as a destination tourist resort. The case has been the subject of extensive decisions by both the Tribunal and the High Court Judge and the facts will also be stated quite fully in judgments of other members of this Court, which I have had the advantage of reading in draft. Accordingly I will endeavour to confine the present judgment to essentials.

The appellants, the Environmental Defence Society and the Tai Tokerau District Maori Council, are supported in their appeals by the Minister of Conservation, whose counsel adopted the submissions made by counsel for the appellants. This was a change of governmental stance in that before the Tribunal and the High Court the Minister of Works and Development supported the rezoning.

The peninsula is a remote one near the north-eastern tip of the North Island. It has white beaches, virtually unspoilt countryside, and some small settlements with a total population of a few hundred, no doubt increasing during the summer holidays. Approval has been limited to

the first stage only of a planned three-stage development that would cover in all about 288 hectares. Stage I alone is estimated to generate a visitor population of 2280; at least one major hotel to accommodate 360 visitors, and possibly more hotels; motels to accommodate 320 visitors; a camping ground to take about 800; an international golf course; an equestrian centre; various other recreational facilities such as tennis and squash courts; a commercial centre including shops and a service station; beach community services; permanent and temporary staff housing. What is aimed at is an integrated 'one-stop' resort which would attract overseas and New Zealand tourists all the year round. Hence, for instance, the golf course and the riding. But the main tourist attraction is intended to be the beach. The main developments are planned to be sited one or two kilometres from the Karikari beach, on high ground. Between that site and the beach and dunes there is a tract of swamp and wetland. The proposal is that people staying at the resort should be transported to the beach, as required, by vehicles and that some appropriate facilities be constructed at the beach. It would seem that a question-mark must hang over whether a beach-orientated complex situated so far from the beach would prove a major tourist attraction. Especially in the winter, it would have to face the competition of other major New Zealand resorts.

In carefully chosen words, the Tribunal in an interim decision delivered by Judge A.R. Turner found that there was

justification for making zoning provision for a tourist resort of this kind and that the land of the company concerned was a suitable location for it. The Tribunal made it clear that these findings were deliberately limited. For instance they were not prepared to find that there was a clearly demonstrated need for a tourist resort development in the district.

The arguments that we heard from Mr Curry and Miss Elias for the appellants ranged widely, but were based on s.3(1) of the Town and Country Planning Act 1977, which enacts that in the preparation of the district schemes certain matters are declared to be of national importance and shall in particular be recognised and provided for. These include '(b) The wise use and management of New Zealand's resources': '(c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development': '(g) The relationship of the Maori people and their culture and traditions with their ancestral land'.

Section 4 defines the purposes of district schemes, referring among other matters to the economic and general welfare of the people of every part of the district, while s.36 lays down that having regard to the present and future requirements of the district every district scheme shall make provision for various matters. It is important to note

that both those sections are expressly made 'subject to section 3 of this Act'.

A section similar to s.3 was first introduced into the legislation in 1973 as s.2B of the Act then in force, but at that stage (g) above was not included and the sections about the purposes and contents of district scheme were not declared to be subject to the new section. When the legislation stood thus, Wild C.J. in Minister of Works v. Waimea County [1976] 1 N.Z.L.R. 379, a case concerning rural subdivisions, endorsed an Appeal Board decision which held that 'it is simply a matter of weighing the welfare of the inhabitants of the County of Waimea against s.2B...'

The decision of the Tribunal now in question contains no discussion of the relationship between s.3 and the other sections, but Chilwell J. observes in his judgment that the Tribunal has consistently held that the change in wording making certain sections subject to s.3 does no more than make explicit what was previously implicit and that the Waimea decision applies to the present Act. The High Court Judge also adopted that view and it may fairly be said, I think, to have been both an express basis of his decision and an underlying assumption of the Tribunal's decision. Read as a whole, their reasoning appears to involve an overall balancing of the various considerations in ss.3 and 4 on the lines approved in the Waimea judgment.

With respect, I am unable to agree that this is a correct view. Rather I agree with the view taken by Dr K.A. Palmer in his Planning and Development Law in New Zealand 202 that the 1977 change was significant. The qualification 'subject to' is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict. This Court had occasion to say so expressly in a reported case the year before the 1977 Act: Harding v. Coburn [1976] 2 N.Z.L.R. 577, 582. There was no need nor reason to insert those words in ss.4 and 36 of the 1977 Act if the legislature had intended that the s.3 matters were no more than matters to which regard was to be had, together with district considerations, in preparing a district scheme. The explanation of the insertion of the words that leaps to the eye, as it seems to me, is that the argument for the Minister of Works rejected in Waimea was henceforth to prevail. There is an analogy with the legislative guidelines provided by declaring a special object for the amending Act considered by this Court in Ashburton Acclimatisation Society v. Federated Farmers [1988] 1 N.Z.L.R. 78 87-8; see also per Bisson J. at 94-5 and per Chilwell J. at 97-9.

Whether or not, in relation to any particular proposed provision of a district scheme, national matters of the categories listed in s.3 can properly be seen as having a significant bearing is partly a question of degree

(compare Foodtown Supermarkets Ltd v. Auckland City Council (1984) 10 N.Z.T.P.A. 262, 267-8). Moreover both the national matters covered by s.3 and the district purposes covered by s.4 are stated in fairly broad and general language; there is enough flexibility in the wording to suggest that often it should be feasible to reconcile in a reasonable way national and district goals. But the general rule made clear by Parliament, in my opinion, is that in the end the matters of national importance must carry greater weight.

In given cases the particular matters of national importance listed as (a) to (g) of s.3(1) may compete among themselves. There is no legislative direction about their weights inter se. It is for the planning authority or the Tribunal on appeal to undertake a balancing exercise on the facts of each particular case. This Court has already so held in North Taranaki Environment Protection Association v. Governor-General [1982] 1 N.Z.L.R. 312, 316.

Paragraph (c) includes the protection of the coastal environment from unnecessary development. In that context, as in many others, necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other. Of course the Tribunal are right in commenting that absolute protection is not given to the coastal environment. I accept, too, that when paragraph (c) is relevant a reasonable rather than a strict assessment is

called for. In other words the question is whether, despite the background that the coastal environment is to be protected, the proposal is reasonably necessary (compare Carlton & United Breweries Ltd v. Minister of Customs [1986] 1 N.Z.L.R. 423, 430; Commissioner of Stamp Duties v. International Packers Ltd [1954] N.Z.L.R. 25, 54 per North J. in this Court). But the test is no light one.

As to para. (g), which first appeared in 1977 and is another sign of heightened sensitivity to Maori issues, the Tribunal's decision was given at a time when there was a line of Tribunal cases treating land no longer owned by Maoris as automatically not ancestral land. Holland J. has since overruled that view in Royal Forest & Bird Protection Society v. W.A. Habgood Ltd (1987) 12 N.Z.T.P.A. 76. In my opinion this Court should now endorse that High Court ruling.

Land which was the original home of a Maori tribe - as here the Karikari Peninsula was by tradition of the Ngati Kahu the landing place of their first canoe - may still be ancestral land although it has been sold to Europeans. If, even after sale, some special Maori relationship with the land has continued down the generations, that is a factor to be weighed when a zoning change is proposed. The weight to be given to it may well vary greatly according to the facts. For instance, a change in the zoning of city land long in Pakeha ownership is unlikely to have any real effect on Maori culture and

traditions. In the case before Holland J., which concerned the mining of sand at Kaitorete Spit, Lake Ellesmere, the same was found to apply. The Judge, in a word derived from a quite different culture, said that the case was a pyrrhic victory for the appellant. But the Courts must of course not allow the Maori safeguard to become a dead letter. It can have true strength, as the result of this case may show.

It is now necessary to apply more specifically the views of the law that I have expressed to the Tribunal's decision. As already noted, the Tribunal appear generally to have reviewed matters of district and national importance without taking into account the Parliamentary intention (as I see it) that the national ones are more important. A specific example of this is that they said that the possibility that the proposed resort may significantly reduce local unemployment and under-development had weighed heavily with them, while stressing that it was only a possibility.

Particularly at the present time, everyone must sympathise with plans to provide more employment opportunities in Northland. This was certainly a most significant district purpose within the scope of s.4. But the Tribunal were careful to put it as no more than a possibility. They could hardly have put it higher. No market or feasibility study was in evidence before them. I do not suggest that one was required by law; that is not

so; but in the absence of careful evidence of the economic practicability of a proposal, it must be harder to show that interference with the coastal environment is necessary.

In any event, as the Tribunal specifically recognised, a resort could be successful from a developer's point of view, yet unsuccessful in terms of its social and economic impact on the local community. What they were avowedly doing was creating an opportunity for a venture of a size and type novel and necessarily speculative in New Zealand: a venture that might or might not be economically successful and might or might not be beneficial for the district and the local community.

The philosophy of encouraging enterprise in development, which can be seen to lie at the heart of the Tribunal's reasoning, has its attraction. Yet cases under the Town and Country Planning Act have to be approached within a statutory framework and with regard to the scheme of values laid down by Parliament. So it was crucial to decide whether the case for affording an opportunity was strong enough to persuade the Tribunal that the proposed development of the coastal environment was necessary in terms of s.3(1)(c).

The Tribunal made no such finding. Indeed they appear to have deliberately refrained from one. The way in which they perhaps sought to meet this difficulty was by their finding that the higher scrub-covered land was

sufficiently far from Karikari Beach to enable the provision of tourist and holiday accommodation to be carried out in a manner subservient to the landscape and substantially preserving the natural character of the coastal environment. But I am constrained to think that this finding is not consistent with their other express findings that all the company's land is in the general coastal environment and that Stage I alone 'would add a massive and abrupt dimension to growth on the peninsula'.

In his careful argument for the company in this Court Mr Salmon put it that 'protection' in para. (c) is not as strong a word as prevention or prohibition; that it means keeping safe from injury and that a development may be permitted if the natural environment is more or less protected. Accepting this apart from the vagueness of 'more or less', I am nevertheless unable to accept that the Tribunal have found that the natural environment would be kept safe from injury. Read as a whole, their decision seems to me ambiguous on this important matter.

Further, it is not clear how the Tribunal saw the Maori issue. They recorded that one of the concerns of the Tai Tokerau Council was the effect of the development on the relationship of the Ngati Kahu with their ancestral land; but they did not make any finding that ancestral land was or was not affected. They made no express mention of s.3(1)(g). Chilwell J. thought that this would have been

preferable but that the Tribunal had adequately taken into account Maori concerns. It is true that they did describe these concerns in passages to be cited in the judgments of other members of this Court, seeking to meet them to some extent by confining approval to Stage I and suggesting that there be at least two Ngati Kahu on a joint committee. But, with respect, this does not directly meet the contention that, to adopt the words of Miss Elias in this Court, the sheer scale of the development, in which the tribe could not participate, would overshadow their presence on the peninsula: that they could not relate to or feel at home with a development of this kind and magnitude. As their spokesman put it in evidence before the Tribunal, the large-scale development would be a flood which would carry his people into the sea.

Miss Elias told us that some 21,000 people claim Ngati Kahu descent. About 9000 of them live in Northland, mainly in the vicinity of Kaitaia. On the peninsula itself there are only about 150, including only about 40 of employable age. It is important to remember that the land in the rezoning proposal itself all belongs to the company, although the intention is to take advantage of beaches vested in the Crown and open to public use, albeit comparatively little used at present. But the Ngati Kahu are the tangatawhenua and they still have considerable landholdings on the peninsula. There are archaeological sites in the dunes. The rezoning was inevitably regarded by

the Tribunal as of both national and regional significance. Without doubt the impact of such a resort would not be confined to the company's land. It would change the character of the whole peninsula. The apparently somewhat conventional seaside settlement at Whatuwhiwhi could well be transformed into a service township. The more successful the project economically, the less the quiet and remote rural quality of the environment. Mr Salmon pointed out that according to the evidence of Mr Jones, the planning officer for the County Council, most of the people on the peninsula support the proposal. Be that as it may, it is clear that the District Maori Council do not, although not opposed to some smaller locality-related development.

Those were all matters to be weighed by the Tribunal in the light of the principle declared by Parliament to be of national importance, that planning should recognise and provide for the relationship of the Maori people and their culture and traditions with their ancestral land. The weighing is not for this Court. On these appeals we are confined to questions of law. Our responsibility is simply to decide whether the true intent, meaning and spirit of the statute has been applied. This is a case where the facts called for a clear and direct grappling with the principle. While sympathising with the Tribunal in a difficult case, I think that they thought it safer or better not to proceed in that way.

Another contention for the appellants was that the Tribunal had merely presumed that it was not possible to attach a destination resort to an existing tourist community in Northland. Again I do not consider that there was any legal onus on the supporters of rezoning to exclude alternative sites (compare the North Taranaki case, supra, at 315) but the apparent lack of specific evidence on this point is another, though lesser, factor contributing to the impression that the proposal has not been subjected to as rigorous a scrutiny as the Act requires.

In summary I think that the Planning Tribunal have not correctly interpreted the Act, or have not given the weight intended by the Act to two principles. One is that the coastal environment should be protected from unnecessary development. The other is that provision should be made for the relationship of the Maori people and their culture and traditions with their ancestral land. So I would allow the appeals.

The remaining question is whether approval of the rezoning should simply be refused or whether the matter should be remitted to the Planning Tribunal for reconsideration. I think that the second course is fairer, particularly as it would give all parties the opportunity to call further evidence in the light of any changes of circumstances that may have occurred since late 1985. Because of retirements a newly-constituted Tribunal will

have to hear the case, assuming that the parties still wish to proceed. That is unfortunate, but it is an unusually important case. Accordingly I would remit the original appeals to the Planning Tribunal for full rehearing.

In accordance with the opinion of the majority of this Court the appeals are allowed and the case remitted as just mentioned. Costs of the present appeal are reserved, leave being reserved to counsel to lodge memoranda if necessary.

RB Cooke P.

Solicitors:
Russell McVeagh McKenzie Bartleet & Co., Auckland and Wellington, for Appellants
Dragicevich Campbell & Smith, Kaitaia, for Respondent

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Counsel: (CA 56/88)
G P Curry and P F Majurey for Appellant
P M Salmon QC and P A Fuscic for Respondent

(CA 57/88)
Miss Sian Elias QC with Miss Denise Bates for Appellant
P M Salmon QC and P A Fuscic for Respondent

K Robinson for Minister of Conservation

Judgment: 27 February 1989

JUDGMENT OF CASEY J

This appeal concerns a major tourist development proposed for the Karikari Peninsula, at present a remote area on the east coast near the top of the North Island. It was described in a Department of Lands and Survey Report of 1979 as in many ways a unique part of Northland combining qualities of remoteness and isolation with a regionally distinctive natural environment. "The combination of barren landscape and spectacular seascape produces an environment with outstanding scenic qualities rarely encountered elsewhere." What is proposed is a "destination tourist resort" comprising a self-contained settlement with facilities which will attract both overseas and local visitors for longer periods by providing a wide range of recreational facilities, as well as serving as a base for visits to other tourist attractions conveniently available.

Similar developments have occurred in areas outside New Zealand but nothing on this scale has been attempted here. When fully developed it is expected to cater for nearly 10,000 visitors and the facilities will include hotels, motels, camping grounds and other accommodation together with shops and supporting services. There will be a full international golf course, equestrian facilities and accommodation for tennis and squash. An artificial lake of some 58 hectares is also envisaged, and the whole

development is expected to require approximately 288 hectares. It is planned to take place in three stages, the first of which will provide accommodation for 2,280 visitors, with only partial development of the recreational and other facilities.

The land concerned is largely owned by a company which has had dealings with the respondent Council over the concept for many years and eventually in 1984 the latter notified a variation of its District Scheme (No.1) providing for an appropriate zoning for such a development. Following objections it determined not to proceed without additions and amendments which it notified in Variation No.4. The Environmental Defence Society objections were disallowed and it appealed to the Planning Tribunal, being supported by the Tai Tokerau District Maori Council. The Tribunal's decision effectively confirmed the zoning and variations approved by the Council, but with some further important variations of its own. Both the Society and the District Maori Council brought separate appeals to the Administrative Division of the High Court and these were heard together. Chilwell J gave judgment on 18 December 1987 in which he dealt with the numerous specific questions asked and dismissed both appeals. On 8 March 1988 he gave leave pursuant to 162(H) of the Town and Country Planning Act 1977 to appeal to this Court.

In granting leave, Chilwell J noted the wide-ranging content of the questions of law put to the High Court, and

observed that the issues might be more effectively identified by Counsel for this Court. This has been attempted in the points on appeal.

Mr Robinson (appearing for the Minister of Conservation) advised us he had appeared in the High Court on behalf of the then Minister of Works and Development to support the Tribunal's decision. There had since been a change of Ministry and he felt he could make no submissions. We gave him the opportunity to obtain further instructions and eventually we were informed that the Minister of Conservation supported the Appellants' submissions but wished to make no independent contribution to the appeal. Counsel for the other parties accepted that she was entitled to be heard, as successor to the Minister of Works and Development, in this area of environmental protection.

In the appeals attention was focussed on the proper interpretation and application of s.3(1) of the Town and Country Planning Act 1977, and in particular of sub-sections (a), (b), (c) and (g). It reads :

> "Matters of national importance -
>
> (1) In the preparation, implementation and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for :
>
> (a) The conservation, protection and enhancement of the physical, cultural and social environment:

(b) The wise use and management of New Zealand's resources:

(c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:

(d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

(e) The prevention of sporadic subdivision and urban dvelopment in rural areas:

(f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities:

(g) The relationship of the Maori people and their culture and traditions with their ancestral land."

The Appellants submitted that s.3 matters of national importance are to be accorded a primacy or priority over other parts of the Act. In his judgment Chilwell J rejected this and said the Council had correctly followed the approach approved by Wild CJ in Minister of Works v Waimea County [1976] 1 NZLR 37, concerning the weight to be given to s.2B of the 1953 Act, the predecessor of the present s.3; "it must be read with all other provisions because the Act must be read as a whole." He commented at p.403 of the case :

> "Reported decisions of the Tribunal show that in weighing up the matters to which its attention is directed by ss.3, 4, 36 and other sections, it adopts a balancing exercise between conservation and development and between public and private advantages and disadvantages of the particular land use under investigation. The balancing exercise relates to competing considerations within the matters to which each section relates and to competing considerations between each material section." (emphasis added)

Section 3 of the 1977 Act added further matters of national importance to those specified in the earlier s.2B, as well as declaring that they should "in particular" be recognised and provided for. Furthermore, s.4(1), dealing with the purpose of regional, district and maritime planning, was made subject to s.3; and s.36, governing the contents of District Schemes, was also made subject to that section. It is as a result of these last two amendments that it is now contended s.3 has a primacy over other provisions relating to regional and district schemes.

Chilwell J accepted the obiter view adopted by the Tribunal in Smith v Waimate West County [1980] 7 NZTPA 241, 259, that the 1977 Act did no more than make explicit what was previously implicit in the earlier Act, adding that "to give s.3 matters the absolute primacy contended for would be to provide a jurisdictional bar to much development." However, Mr Curry informed us that he did not seek absolute primacy and accepts that s.3 must take its place in the Act as a whole; but he submitted that the words "subject to" in the succeeding sections require something more than simply balancing the matters of national importance along with all the other purposes and provisions laid down for regional and district schemes.

I agree with this submission and consider that the words "subject to Section 3" introducing sections 4 and 36 call for more than a mere balancing exercise whenever there is a

divergence between their application and the requirements of s.3 As this Court observed in Harding v Cockburn [1976] 2 NZLR 577, 582,

> "The qualification "subject to" is a standard way of making clear which provision is to govern in the event of conflict. It throws no light, however, on whether there would in truth be a conflict without it."

Accordingly, if conflict exists between their provisions, s.3 must prevail over the other sections. There is also an obvious potential for conflict among the different matters of national importance specified in s.3(1) itself. When this occurs the Tribunal must engage in a balancing exercise, which will be affected by indications of special emphasis or weight to be given to any particular matter.

One factor which the Tribunal said weighed heavily in its decision was the possibility that tourism may significantly reduce local unemployment and under-development. It mentioned the developer's intention to set up a management committee with local people on it to deal with the functioning of the resort and its integration with the community, and suggested there should be two Ngati Kahu people included. The emphasis on employment opportunities was criticised as indicating that it had simply balanced s.4 against s.3 without recognising that the former was subject to the latter. However, I am satisfied that notwithstanding the acknowledged weight s.4 considerations had in the decision (and not surprisingly,

having regard to the current economic position of Northland), the scheme as now approved effectively resolved any inconsistency between them.

Chilwell J conducted an extensive review of the Tribunal's treatment of the evidence and its conclusions in relation to the sub-section 3(1). He observed that although there was no express reference to (a), its decision "is replete with references to the physical environment and concern for its conservation protection and enhancement." This is indeed so; the Tribunal was acutely alive to the physical, cultural and social impact of such a huge development in that area.

It was equally concerned with the matters in s.3(1)(c) and a large part of the decision was specifically directed towards the preservation and protection of the peninsula, finding that the subject land is within the general coastal environment. It dealt with environmental and archeological aspects requiring preservation, including the immediate coastal strip, the wetlands and the dune areas, which also afforded sanctuary for the wildlife. It referred to the extensive landscape planning, resulting in siting the development on higher scrub-covered land, designed to take advantage of its natural attributes and maintain the integrity of the landscape.

The Tribunal considered the fundamental question of the need for such a development and was obviously influenced by

witnesses in the tourist industry called by the Respondent, including one from the Tourist and Publicity Department on behalf of the former Minister of Works and Development. It also discussed contrary evidence from the Appellants. From the way this evidence was dealt with, I am satisfied that, contrary to Appellant's submissions, the Tribunal recognised that a need for the project had to be established. It pointed to the obvious commercial risks, observing that market demand and support must be generated, and concluded that "land use planning should give the opportunity for someone to take that risk if their market research indicates that it is justified, and no-one from the tourist industry opposed the variations." That uncertainty led the Tribunal to restrict the development in the meantime to what it saw as the viable Stage I.

There must, of course, (as Chilwell J pointed out) be a strong subjective element involved in reaching such a conclusion, but the evidence was there for the Tribunal to accept and act upon, enabling it to regard such a development as a wise use and management of New Zealand's resources to be balanced against the other matters of national importance in s.3(1).

The Appellants submitted that no evidence had been produced of the developer's financial position. The Tribunal ruled financial viability was irrelevant, stating that "zoning can only provide opportunities; and it does not necessarily follow that opportunities will be taken up."

Chilwell J upheld this approach. With respect, I do not share his view. As Miss Elias submitted, this is really a tailor-made zoning for a proposal of regional and national significance involving a tourist development on a quite unprecedented scale for New Zealand. The prospect of an abandoned half-built resort of this size in such beautiful surroundings would have to be of concern to anybody considering the requirements of s.3(1)(c), and probably would be relevant (a), (b) and (g) as well. However, I think the Tribunal - whether consciously or not - took such a consideration into account in its programme by allowing only Stage I to proceed at first, with very specific controls over the manner of development. It considered this would be viable.

There was also criticism of an alleged failure to consider other sites. In a passage at p 324 of the case the Tribunal said it had to "presume" it was not possible to attach a destination resort to an existing tourist community in Northland, and that those supporting the Variations assured it to that effect, while nothing advanced by the Appellant gave any ground to question it. There was evidence about the suitability of other sites. In dealing with this point, Chilwell J concluded there was ample evidence supporting the Tribunal's view, and while the use of the word "presume" might have been unfortunate, it did not alter the sense of its finding in this respect. I agree with this assessment.

The Appellants made a strong attack on what they saw as the Tribunal's failure to come to grips with s.3(1)(c), relating to preservation of the natural character of the coastal environment and the margins of lakes and rivers, and their protection from unnecessary sub-division and development. They submitted both in the High Court and before us that the word "unnecessary" imposed a very high level of protection, and stressed that unless the need for this resort and its viability were established to a correspondingly high degree of probability, then the interests protected by sub-clause (c) must prevail. They accepted, however, that the section does not impose an absolute bar on development.

The Act's essential concern is with people and the quality of their lives. Section 3 declares that the matters of national importance need only be "recognised and provided for" in the various schemes; it does not require a higher degree of protection. Accordingly the Act is not to be approached in quite the same way as one more directly concerned with the preservation of physical resources, such as the Water and Soil Conservation Act 1967. It will be clear from my earlier comments that I consider the Tribunal fully appreciated the importance of s.3(1)(c).

The Tribunal's decision, read as a whole, satifies me that it gave due recognition to the matters set out in sub-sections 3(1)(a),(b) and (c) of the Act, and the conditions it has either approved or imposed ensure that the scheme contains proper provision for them.

This brings me to s.3(1)(g) requiring that the scheme recognise and provide for the relationship of the Maori people and their culture and traditions with their ancestral land. The Tribunal observed that there was a small Maori community and marae on the eastern side of the peninsula at Whatuwhiwhi, and a very small community at Merita on the northern part. They were members of Ngati Kahu and we were informed by Miss Elias that there are about 9,000 in the whole tribal area, of whom only about 150 live on the peninsula. In expressing their particular concerns the Tribunal said this at p 322 of the case :

> "The appeals were supported by the Tai Tokerau District Maori Council. The particular concerns of the Maori Council were the effect which development in accordance with the variations would have on the relationship of the Ngati Kahu people with their ancestral land, the effect which it would have on the coastline and the sea, the protection of sacred sites and archaeological values and the social impact. .....
>
> The eminent spokesman for Ngati Kahu, who gave evidence, said that his people wish to see progress but that they are against a large scale tourist resort at Karikari Bay; that they wish to preserve their lifestyle from such an obtrusive development, which he foresees as a flood which will carry his people to the sea. He told us of the history of the area, of the significance to his people of the sea and its bounty, of the struggle for existence there and the efforts being made to ensure economic, social and cultural survival. He concluded by saying that his people would like to be associated with a small, locality-related development which would fit into their community and with which they could grow into a warm, welcoming and distinctively different tourist centre from the type that would be permitted by the Variations.

> Another witness for the Maori Council was an archaeologist who told us of the archaeological discoveries already made in various parts of the company's land and the effect which development would have on these, and of the archaeological evidence in other parts of the peninsula."

The Tribunal accepted the following passage from the evidence of Mr Hanley :

> "The economy must diversify and look to labour intensive opportunities. Tourism does not guarantee local jobs nor the protection of the natural environment or the economic and cultural well-being of the area's substantial Maori population. However, if well planned and with broad based local participation and control, tourism may substantially reduce local unemployment and under-development. Few alternative opportunities are apparent at this time."

As Chilwell J said, when giving reasons for confining the re-zoning to Stage I, the Tribunal accepted evidence from a social planning witness that to achieve appropriate and sustainable development, tourism on the peninsula must ensure the protection and enhancement of the environment, local community life, and the role of the Ngati Kahu as protectors of the waahi tapu and kaimoana. The conditions imposed serve to protect the foreshore and dune area (the latter containing sacred burial sites) from virtually any development.

Miss Elias informed us that she had asked the Tribunal to rule that the peninsula was "ancestral land" within the meaning of s.3(1)(g), but it had failed to do so and she

submitted that its thinking on this aspect was probably influenced by earlier decisions that the land had to be in Maori ownership. Since then Holland J decided in Royal Forest and Bird Protection Society (Inc) v W A Habgood Ltd [1987] 12 NZTPA 76 that previous definitions had been unduly restrictive. The ordinary meaning of "ancestral land" is land which has been owned by ancestors. He held that there must be some factor or nexus between their culture and traditions and the land in question which affects the relationship of the Maori people to it. With respect, I think that is an appropriate view of s.3(1)(g).

It must be accepted that the Tribunal made no specific reference to that section, but it did not express any disagreement with the Maori Council's assertion that it was Ngati Kahu ancestral land. And, as Chilwell J observed, it did not ignore Maori concerns; indeed, from the extracts quoted above, it was obviously very sensitive to them, as well as to the social and economic problems of the Maori people in the district. There is obvious overlapping between the matters set out in sections 3(1)(a) and (g). From the evidence before us and the submissions by Counsel, it seems clear that the Maori concerns are due to the sheer size of the project and its character as a self-contained resort. They are very real, notwithstanding that those occupying the peninsula are now only a remnant of Ngati Kahu. The land is still regarded as part of the home territory by others in the tribal area and by those who have left the district.

The Tribunal clearly addressed these concerns and sought to meet them by the limitation on the siting and scope of the development and its timing, and the stringent restrictions on access to the coast and dune areas. It also acepted undertakings and itself suggested proposals for the operation of a committee on which Maori people would be represented. Although there is no specific reference to s.3(1)(g) in the decision, its concerns have been recognised and provided for in the scheme, and in achieving that result I am satisfied that it was effectively taken into account by the Tribunal to the extent warranted by the evidence disclosed in the appeal hearings.

For these reasons I would dismiss the appeals.

M.E. Casey J

IN THE COURT OF APPEAL OF NEW ZEALAND CA 56/88

IN THE MATTER of the Town and Country Planning Act 1977

A N D

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN: ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

AND: MANGONUI COUNTY COUNCIL

Respondent

A N D

CA 57/88

BETWEEN: TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

AND: MANGONUI COUNTY COUNCIL

Respondent

Coram: Cooke P
McMullin J
Somers J
Casey J
Bisson J

Hearing: 2, 3 and 4 May 1988

Counsel: G P Curry and P F Majurey for Environment Defence Society Incorporated
Sian Elias QC and Denise Bates and Tai Tokerau District Maori Council
P M Salmon QC and P A Ruscic for Manganui County Council and Doubtless Bay Development Co
K Robinson for Minister of Conservation

Judgment: 27 February 1989

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JUDGMENT OF BISSON J

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Moves to establish a destination tourist resort on land at Karikari peninsula go back some 10 years. They have reached the stage that the Respondent Council has made zoning provision for the development of such a resort and opposition from the two appellants has failed before the Planning Tribunal and in the High Court. In granting leave under s.162H of the Town and Country Planning Act 1977 to appeal to this Court, Chilwell J summarised the background to the appeals as follows,

> "The two appeals to this Court arose from a determination of the Planning Tribunal approving of variations to the proposed reviewed district scheme of the Mangonui County Council (the Council) which provided for the zoning of land on the Karakari Peninsula for the development of a destination tourist resort to be called the Karakari Tourist Resort Zone. According to the scheme statement the zone provides for the development of an integrated, self-contained, fully serviced tourist complex which is expected to cater for both domestic and international tourists and to contain a variety of accommodation, recreation, entertainment and shopping facilities. It is a resort which will contain a wide variety of tourist accommodation ranging from camping grounds through low-cost accommodation to top quality hotels with a small commercial area to serve the resort and with recreational activities such as an international golf course and a riding trail. It is common ground that the proposed development is on a scale unique to New Zealand. For that reason alone it must have significant impact upon the environment of the Karakari Peninsula and upon the wider community of Northland.
>
> In my judgment I answered 16 questions framed by the appellants as questions of law which were resolved unfavourably to the appellants with the result that each appeal was dismissed leaving the Planning Tribunal determination intact. These same questions have been advanced by each appellant as the questions of law to be involved in the appeal to the Court of Appeal if leave is granted."

His reasons for granting leave were,

"In the present case the magnitude of the proposed development, its uniqueness, its impact upon the environment and upon the wider community of Northland is such as to make it proper to grant leave. In addition there are several issues of town planning jurisprudence of general and public importance which ought to be examined by the Court of Appeal."

The first point of law of importance is the application of s.3(1) of the Act in the context of the Act as a whole. In particular the question is what degree of primacy, if any, is to be given to matters of national importance specified in s.3(1) as follows,

"3. Matters of national importance - (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:

(a) The conservation, protection, and enhancement of the physical, cultural, and social environment:

(b) The wise use and management of New Zealand's resources:

(c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:

(d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

(e) The prevention of sporadic subdivision and urban development in rural areas:

(f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities:

(g) The relationship of the Maori people and their culture and traditions with their ancestral land."

It is the relationship of s.3(1) to s.4 which is at the heart of these appeals. Section 4 is as follows,

> "4. Purpose of regional, district, and maritime planning - (1) Subject to section 3 of this Act, regional, district, and maritime planning, and the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people, and the amenities, of every part of the region, district, or area.
>
> (2) The general objectives of regional, district, and maritime schemes shall be to achieve the purposes specified in subsection (1) of this section.
>
> (3) In the preparation, implementation, and administration of regional, district, and maritime planning schemes, and in the administration of Part II of this Act, regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967."

As I read the Planning Tribunal's decision it preferred to provide an opportunity for the proposed development rather than to consider the need for it. The Planning Tribunal's emphasis on opportunity for development rather than need for development is shown in this passage of its decision,

> "If (the land) is to be put to those purposes, then other resources will be required to develop the land. Where those resources will come from, indeed whether they will be available, are not questions which land use planning can examine. So that while land use planning must examine questions of need, zoning can only provide opportunities; and it does not necessarily follow that opportunities will be taken up."

The Planning Tribunal rejected the essential issue defined by counsel for the appellants, whether there is a clearly demonstrated need for a tourist resort development in the district, preferring to formulate the issue whether there is justification for making zoning provision for a new tourist resort.

While in considering zoning provisions of regional and district schemes there is justification to anticipate demand and plan ahead, that approach is not appropriate if the zoning may fail to protect the natural character of the coastal environment. If that possibility exists, the preservation of that environment, as a matter of national importance, must not be threatened by a subdivision or development which is unnecessary. This is because planning under s.4 is subject to the provisions of s.3. Accordingly an opportunity for development under s.4 should not be made if it is outweighed by a matter of national importance as defined in s.3(1). The Planning Tribunal had particular regard for the possibility of the beneficial consequences of the development by reducing local unemployment and under-development of the district but stressed this was only a possibility. Such beneficial consequences are desirable aspects of such a development particularly relevant in a district scheme under s.4. But the Planning Tribunal also recognised that tourism does not guarantee the protection of the natural environment and that it can be destructive of

that environment. Those two aspects of the case raise for consideration the preservation of the environment from unnecessary development under s.3(1)(c).

As with recognising and maintaining the amenity afforded by waters in their natural state, the object of the Water and Soil Conservation Amendment Act 1981, the emphasis of s.3(1)(c) is conservation. "Although certainly not to be pursued at all costs, it has been laid down as a primary goal; and this must never be lost sight of." (See Cooke P in Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc [1988] 1 NZLR 78 at p.88. As matters of regional and district importance under s.4 are subject to matters of national importance under s.3(1), Parliament has decreed that the latter have an overriding objective. Once the natural character of the coastal environment has been lost, it may never been regained. Once the door has been opened to allow a development which fails it is difficult to close the door without some permanent damage, some scar, remaining.

Referring to the provisions of s.3(1)(c), the Planning Tribunal said, only by way of comment in parenthesis,

> "(By way of comment on that requirement, we say that it does not require that land use planning give absolute protection to the natural character of the coastal environment, else there would be no subdivision or development at all in that environment.)"

That writing down of the impact of s.3 on s.4 of the Act appears to have led the Planning Tribunal into

considerations of the suitability of the site for possible development rather than considering whether the development of land admittedly in the general coastal environment was necessary. The latter consideration should have been its first and paramount consideration. Obviously the provisions of s.3(1) are not absolute in their terms but it is mandatory that the matters declared to be of national importance be recognised and provided for to the extent that they are relevant. It is from unnecessary subdivision and development that the preservation of the natural character of the coastal environment must be protected.

Chilwell J referred to the judgment of Wild CJ in Minister of Works v Waimea County [1976] 1 NZLR 379 which concerned the weight to be given to ss.2B and 18 of the 1975 Act. In that judgment it was held, at p.382,

> "It is not a matter of "weigh[ing] the effect of both sections" as stated in question (1), but rather of weighing all the facts and circumstances and applying the sections. This is a matter of judgment for the board bearing in mind its powers, duties and functions as set out in s.42."

Since that judgment the amendments to the Act by making s.4 subject to s.3 in my view now involve "weighing the effect of both sections", the effect being to accord primacy to matters of national importance. This change does not appear to have been appreciated by the Planning Tribunal as according to Chilwell J reported decisions of the Tribunal show that,

> "in weighing up the matters to which its attention is directed by sections 3, 4, 36 and other sections it adopts a balancing exercise between conservation and development and between public and private advantages and disadvantages of the particular land use under investigation. The balancing exercise relates to competing considerations within the matters to which each section relates and to competing considerations as between each material section."

This balancing exercise must, however, take into account that the scales are weighted in favour of matters of national importance being recognised and provided for, but if a subdivision or development in a coastal environment is necessary then the protection and preservation of that environment may be outweighed. Necessary is a strong word defined in the Shorter Oxford English Dictionary as meaning "indispensible" or "that which cannot be done without". Accordingly, the necessity for this substantial development at Karikari rather than elsewhere in Northland called for a wide ranging enquiry into that issue for which the Planning Tribunal said the appeal process was not apt. The approach adopted by the Planning Tribunal and upheld by the High Court, was that the possibility of the tourist development taking place was a justification for a planning provision, having beneficial social and economic effects on the district in general and on the local community. All the land in question was in the general coastal environment and even if planning were restricted to Stage I on the higher scrub-covered land its effect on that natural environment could be destructive. But there was no finding that the

need for such a development outweighed the national importance of preserving and protecting the natural character of the coastal environment. That being the case the vital issue, as I see it, under s.3(1)(c) namely, "The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development", has not been addressed.

Another point of law raised on appeal is the interpretation of s.3(1)(g).

> "(g) The relationship of the Maori people and their culture and traditions with their ancestral land."

The Planning Tribunal made no direct reference to this provision. Its decision was delivered prior to judgment being delivered by Holland J in Royal Forest and Bird Protection Society (Inc) v W A Habgood Ltd (1987) 12 NZTPA 76. In that judgment he said, at p.81,

> "I can see no logical or legal reason why s.3(1)(g) of the Act should be of no application solely because the land in question is no longer owned by Maoris. Previous decisions of the Tribunal to this effect should be regarded as overruled."

An example of such a previous decision is that of the Planning Tribunal (Special Division) in Re An Application by NZ Synthetic Fuels Corporation Ltd under The National

Development Act 1979 (1981) 8 NZTPA 138. The decision in that case referred to a number of decisions of the Tribunal in which the meaning and application of s.3(1)(g) were considered. From these decisions it was derived,

> "(4) 'Ancestral land' means land inherited from one's ancestors. Emery v Waipa County Council. Land which has passed into ownership and occupation of people who are not Maori does not qualify. Quilter v Mangonui County Council."

I agree with Holland J that land no longer owned by Maoris may nevertheless qualify as ancestral land under s.3(1)(g). To the extent that the ancestors of present day Maoris occupied New Zealand most of New Zealand would qualify as ancestral land. But, s.3(1)(g) is only concerned with ancestral land with which the Maori people (not individuals) and their culture and traditions have a relationship. As Holland J said, at p.81,

> "Clearly continuous ownership of the land by Maoris would often be a relevant factor in that relationship. Likewise it may be an important factor to consider the extent to which a special relationship by Maoris has been claimed or recognised by them throughout the generations. More importantly, the effect of the proposed use of the land on that relationship will have to be considered in each case."

The Planning Tribunal did refer in its decision to the concerns of the Tai Tokerau District Maori Council, one of the appellants. It said,

> "The particular concerns of the Maori Council were the effect which development in accordance with the variations would have on the relationship of the Ngati Kahu people with their ancestral land, the effect which it would have on the coastline and the sea, the

> protection of sacred sites and archaeological values and the social impact.
>
> ... The eminent spokesman for Ngati Kahu, who gave evidence, said that his people wish to see progress but that they are against a large-scale tourist resort at Karikari Bay; that they wish to preserve their lifestyle from such an obtrusive development, which he foresees as a flood which will carry his people to the sea. He told us of the history of the area, of the significance to his people of the sea and its bounty, of the struggle for existence there and the efforts being made to ensure economic, social and cultural survival. He concluded by saying that his people would like to be associated with a smaller, locality-related development which would fit into their community and with which they could grow into a warm, welcoming and distinctively different tourist centre from the type that would be permitted by the Variations.
>
> Another witness for the Maori Council was an archaeologist who told us of the archaeological discoveries already made in various parts of the company's land and the effect which development would have on these, and of the archaeological evidence in other parts of the peninsula."

Although the Planning Tribunal referred to the relationship of the Ngati Kahu people with their ancestral land, it did not then refer to this relationship in terms of s.3(1)(g). There is a danger that, as the land in question was owned by a company, the Planning Tribunal considered it could not be "ancestral land" in terms of s.3(1)(g). I agree with Chilwell J that the Planning Tribunal did not ignore Maori concerns but it reached a decision without applying and according primacy to the mandatory provisions of s.3(1) to recognise and provide for the relationship of the Maori people and their culture and conditions with their ancestral lands. To allow Stage 1 of this development to take place,

2280 people would be accommodated where the present population of the peninsula is only a few hundred. This could open the floodgates and see the remaining Ngati Kahu people with their culture and traditions swept away. The minority representation of the Ngati Kahu people on a "Karikari Advisory Sub-committee" or on a "Karikari Joint Committee of Management" falls far short of Parliament's intention to treat their relationship with their ancestral land as a matter of national importance. If the recognition and provision for that relationship of the Maori people with their ancestral land requires refusal of planning consent for a tourist development on that land as being incompatible with that relationship, then that is the price to be paid for preserving the culture and traditions of the Maori people as a matter of national importance.

As the Planning Tribunal said, its task was "an onerous and difficult one". It has special skills and experience in dealing with such cases. My views are in no way a reflection on the comprehensive and careful analysis it made of the evidence and issues as it saw them in its decision. However, two important questions of law have emerged, the answers to which, in my view, indicate errors of law by the Tribunal in its application of s.3(1)(c) and (g) to the facts of this case.

For these reasons I would allow each appeal, set aside the decision of the Tribunal, and remit the case for rehearing.

G E Bisson J.

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 56/88

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

A N D C.A. 57/88

BETWEEN TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

Coram Cooke P
McMullin J
Somers J
Casey J
Bisson J

Hearing 2, 3, 4 May 1988

Counsel G.P. Curry and P.F. Majurey for Environmental Defence Society Incorporated
Sian Elias QC and Miss Denise Bates for Tai Tokerau District Maori Council
P.M. Salmon QC and P.A. Fuscic for respondent and Doubtless Bay Development
K. Robinson for Minister of Conservation

Judgment 27 February 1989

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JUDGMENT OF SOMERS J

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These appeals are brought under s.162H of the Town and Country Planning Act 1977 and are accordingly on questions of law only. The facts giving rise to the litigation, the decision of the Planning Tribunal, and the determination of the High Court on appeals to it on questions of law are fully set out in the judgments of McMullin J and Casey J and I do not propose to repeat what they have written except to the extent necessary to explain my opinion of the two cases.

The central issue is whether the path followed by the Planning Tribunal in reaching its decision accords with the true construction of s.3 of the Act and the relation between that section and s.4. It is convenient to consider the meaning and intent of the statute before examining the decision of the Tribunal.

Sections 3 and 4 of the Act provide as follows -

> 3. Matters of national importance - (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:
>
> (a) The conservation, protection, and enhancement of the physical, cultural, and social environment:
>
> (b) The wise use and management of New Zealand's resources:
>
> (c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:
>
> (d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

(e) The prevention of sporadic subdivision and urban development in rural areas:
(f) The avoidance of unnecessary expansion of urban areas into rural areas or in adjoining cities:
(g) The relationship of the Maori people and their culture and traditions with their ancestral land.

(2) The Minister may exercise all such powers as are reasonably necessary for promoting, in accordance with the provisions of this Act, matters of national interest and the objectives of regional, district, and maritime planning.

4. Purpose of regional, district, and maritime planning - (1) Subject to section 3 of this Act, regional, district, and maritime planning, and the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people, and the amenities, of every part of the region, district, or area.

(2) The general objectives of regional, district, and maritime schemes shall be to achieve the purposes specified in subection (1) of this section.

(3) In the preparation, implementation, and administration of regional, district, and maritime planning schemes, and in the administration of Part II of this Act, regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967.

The relation between these two sections is, in my view, apparent from their provisions. Each deals with regional district and maritime schemes and the administration of Part II of the Act. For ease of exposition, however, I will refer only to district schemes with one of which these appeals are concerned.

Section 3(1) declares the seven stated matters to be of national importance and requires that they shall in particular be recognised and provided for in district

schemes. Section 4, on the other hand, is concerned with the purposes and objectives of district schemes. The resources, the wise use and management of which are a general purpose of a district scheme, are the resources of the district and the direction and control of the development of a district are to be undertaken so as to promote and safeguard the health, safety and convenience of the people of the district and their economic, cultural and social welfare, and the amenities, of the whole district.

Section 4 is expressly declared to be 'subject to section 3'. As the district scheme must provide for the matters of national importance mentioned in s.3 this can only mean that the purposes and objects set out in s.4, which have as their aim the benefit of the district, must give way to the stated national interests. In short, the interests of the district are subordinate to the declared matters of national importance. This I think is not only the natural meaning of the provisions of the Act but a rational approach to any conflict between such matters.

Minister of Works and Development v Waimea County [1976] 1 N.Z.L.R. 379 was concerned with this point in relation to ss.2B and 18 of the Town and Country Planning Act 1953. Section 2B contained provisions similar to s.3(1)(c)(d) and (e) of the 1977 Act. Section 18 set out the general purpose of district schemes on lines similar to the second part of s.4 of the 1977 Act. The Town and Country Planning Appeal Board had held that 'it is simply a matter of weighing the

welfare of the inhabitants of the County of Waimea against s.2B'. The Supreme Court held that s.2B must be read with all the other provisions of the Act and that the Board was required to act in every case according to the circumstances and upon the facts before it.

If this was intended to mean that the national and local interests must be weighed or balanced against each other I am afraid I cannot agree. Any doubt which attended the matter is removed by the addition to s.4 of the 1977 Act of the words 'Subject to section 3'.

There are only three aspects of s.3 to which reference need be made in these cases. The first is the use of the word 'unnecessary' in s.3(1)(c) which provides as a matter of national importance -

> The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:

(The word unnecessary is also used in s.3(1)(f) while in s.3(2) the words 'reasonably necessary' are employed.)

The word 'necessary' is one of somewhat protean dimensions. It may import something which cannot be done without, that is to say something indispensable or it may mean requisite or needful. The last two themselves embrace varying degrees of necessity.

The meaning and strength of the word 'unnecessary' in s.3(1) is to be gathered from the fact that preservation,

declared to be of national importance, is only to give way to necessary subdivision and development. To achieve the standard of necessity it must be shown that the subdivision or development attains that level when viewed in the context of national needs. Further than that I do not think it desirable to go.

That leads to the second point. It will, no doubt, often be the case that there is some conflict between the matters of national importance listed in s.3. When that occurs it will be necessary to weigh the conflicting national interests and reach a conclusion as to where on balance the matter lies. A necessity which might otherwise be sufficient may have to succumb to other features in s.3 whose importance is, in the circumstances, of greater strength.

The third point arises under s.3(1)(g) -

> The relationship of the Maori people and their culture and traditions with their ancestral land.

In Knuckey v Taranaki County Council (1978) 6 N.Z.T.P.A. 609 the Planning Tribunal held that the words 'their ancestral land' was land which, regardless of legal tenure belongs to or is vested in the tribe concerned and by operation of law and/or custom is owned by or is regarded as owned by or is capable of being owned by the present members of the tribe and their descendants as one entity and is associated historically with the burial of ancestors. This

has been elaborated in later cases with the result that, in effect, land no longer in Maori ownership has been held not to be ancestral land. In Royal Forest and Bird Protection Society (Inc) v W.A. Hobgood Ltd (1987) 12 N.Z.T.P.A 76, however, Holland J held that present ownership was not necessary. It was enough that it had been owned by ancestors and that the relationship referred to in s.3(1)(g) was established.

I am in agreement with Holland J. In ordinary parlance the word 'ancestral' means of, belonging to, or inherited from, ancestors and there is no reason to suppose it was not so used in s.3(1)(g). It follows that present ownership is not necessary. The extent of the necessary relationship of the Maori people and their culture and traditions with the ancestral land will obviously vary and with that variation the weight to be accorded it and degree of protection necessary to preserve it.

I turn now to the interim decision of the Planning Tribunal of 3 February 1986 with which these appeals are concerned.

The Tribunal found, inevitably as I think on the evidence, that all of the land concerned is in the general coastal environment, and, also inevitably, that Stage 1, which it authorised, 'would add a massive and abrupt dimension to growth on the peninsula. Change can be overwhelming and destructive by its mere size'. It also

considered that the beach and foreshore area is such an important part of the coastal environment that it would be quite contrary to the requirements of s.3(1)(c) to permit any development within it other than beach related facilities. By limiting the development to Stage 1 in areas behind the beach it sought to limit or contain the adverse effects of the proposal. That view was summarised as follows -

> It is sufficiently far from Karikari Beach that development of tourist and holiday accommodation can be carried out in a manner which is subservient to the landscape and which substantially preserves the natural character of the coastal environment. That part of the company's land does not have an untouched or remote character.

The process by which the Tribunal reached that conclusion must now be considered.

Early in its decision the Tribunal stated its approach -

> In allowing or disallowing these appeals we must apply the provisions of sections 3 and 4 of the Act to the circumstances of the case. ... We do so against the background that the respondent by adopting Variations Nos 1 and 4 has in effect concluded that they are an appropriate application of sections 3 and 4 to the circumstances of the case; and that by supporting the respondent in its opposition to these appeals the Minister is of the same opinion.

(It should be mentioned that in this Court the Minister of Conservation supported the appeals).

The appellants had defined the issues as being whether there was a clearly demonstrated need for a tourist resort in the District, and, if so, whether the Karikari peninsula was a suitable location. The Tribunal thought the issues

were better formulated as being whether there was justification for making a zoning provision for a new resort and, if so, whether the peninsula was a suitable place. It held that 'applying the requirements of sections 3 and 4 there is justification' for making the zoning provision on the peninsula. This conclusion followed a finding that a destination resort would have regional and national significance even if developed only to Stage 1 and having posed the question whether the proposal was a wise use and management of the land affected, implicitly at least, answered it in the affirmative. It supported that conclusion by reference to the possibility of significant reduction in local unemployment and under-development - a possibility which it records 'weighed heavily with us'. It must also be added that the Tribunal found that 'it is only a possibility that a destination resort will have beneficial, social and economic effects on the district in general and on the local community in particular. A resort could be successful from the developer's point of view yet unsuccessful in terms of its effects on the district and community'. It also recorded that 'those supporting the Variations did not call any evidence to establish that there is anyone with the financial resources ready and willing to undertake the development should the Variations be upheld.'

This was a difficult case for the Tribunal and the structure of its decision means that it is not an easy one for this Court. I am left with the clear impression that

the Tribunal has approached its examination of the case in the way indicated in Minister of Works and Development v Waimea County [1976] 1 N.Z.L.R. 379. For the reasons already set out I am of opinion that this was erroneous. The matters of local advantage must take second place to those of national importance. The land was found to be within the coastal environment, a matter specifically dealt with in s.3(1)(c). It was accordingly for the applicants to show that the development was necessary and outweighed any other national interests. As I read the decision support for the Tribunal's conclusion was found by reference to the wise use and management of New Zealand's resources - this must be a reference to s.3(1)(b) - and by the weight of the (possible) local advantages mentioned.

As already indicated, I think the latter were subservient to the former. There may be cases in which the matters of national importance will to some extent overlap but I do not think this was one in which paras (b) and (c) of s.3(1) did so. The particular reference to preservation of particular parts of the countryside in s.3(1)(c) seem to me to call for separate consideration rather than being weighed against the wise use of New Zealand's resources. In present day jargon coastal environment may be described by some as a resource. But, as I read the Act, it is not Parliament's usage of the term. The resources referred to in s.3(1)(b) do not include the matter mentioned in s.3(1)(c) and the case was one which called for consideration of s.3(1)(c) unaffected by para (b).

The other feature of the case to which I wish to refer is that relating to s.3(1)(g). The Tribunal recorded the case for the Tai Tokerau District Maori Council in this way -

> Their appeals were supported by the Tai Tokerau District Maori Council. The particular concerns of the Maori Council were the effect which development in accordance with the variations would have on the relationship of the Ngati Kahu people with their ancestral land, the effect which it would have on the coastline and the sea, the protection of sacred sites and archaeological values and the social impact. But counsel for the Maori Council addressed on the whole case in the light of the evidence by the other parties to the appeals.
>
> The eminent spokesman for Ngati Kahu, who gave evidence, said that his people wish to see progress but that they are against a large-scale tourist resort at Karikari Bay; that they wish to preserve their lifestyle from such an obtrusive development, which he foresees as a flood which will carry his people to the sea.
>
> ...
>
> He concluded by saying that his people would like to be associated with a smaller, locality-related development which would fit into their community and with which they could grow into a warm, welcoming and distinctively different tourist centre from the type that would be permitted by the Variations.

At the time of the hearing before the Tribunal the Royal Forest and Bird Protection Society (Inc) case had not been heard. Planning Tribunals had evidently followed the decision in Knuckey's case. The Tribunal was asked to reconsider Knuckey and to decline to follow it. These submissions are not referred to in the decision. Having stated the case for the District Maori Council in the way set out above the Tribunal did not again refer to s.3(1)(g) although mentioning the fact that the beach and dune area had particular significance to the Maori people and

contained a number of archaeological sites and approving the constitution of a committee of Management including Maori representatives. I think it is to be inferred that, consistently with Knuckey, it did not consider the lands in question were 'ancestral lands'. If that is not so, then I am of opinion that no appropriate weight was given to s.3(1)(g).

The case was one in which at least two matters of declared national importance, those mentioned in s.3(1)(c) and s.3(1)(g), were present. Each formed an obstacle to the planned development of the area which those seeking to achieve that development had to overcome. My consideration of the decision of the Tribunal leads me to the conclusion that the importance and primacy given those matters by Parliament was not fully recognised by the Tribunal. It follows that the case has been approached by it under a misapprehension of law.

For those reasons I would allow each appeal, set aside the decision of the Tribunal, and remit the case to it for rehearing.

Solicitors
Russell McVeagh McKenzie Bartleet & Co., Wellington, for Appellants
Dragicevich Campbell & Smith, Kaitaia, for Respondent

IN THE COURT OF APPEAL OF NEW ZEALAND CA. 56/88

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

AND CA.57/88

BETWEEN TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

Coram Cooke P
McMullin J
Somers J
Casey J
Bisson J

Hearing 2, 3 and 4 May 1988

Counsel G.P. Curry and P.F. Majurey for Environmental Defence Society Incorporated
Sian Elias QC and Miss Denise Bates for Tai Tokerau District Maori Council
P.M. Salmon QC and P.A. Fuscic for respondent and Doubtless Bay Development
K. Robinson for Minister of Conservation

Judgment 27 February 1989

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JUDGMENT OF McMULLIN J

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These appeals are brought against the judgment of Chilwell J delivered in the High Court on 18 December 1987 dismissing the appeals of the present appellants, the Environmental Defence Society Incorporated ("EDS") and Tai Tokerau District Maori Council ("the Maori Council"), against an interim decision of the Planning Tribunal given on 3 February 1986 allowing variations to the District Scheme of the Mangonui County Council ("the County Council"). The case is of considerable public and environmental importance and involves the interpretation and application of ss. 3 and 4 of the Town and Country Planning Act 1977. For these reasons Chilwell J gave the appellants leave, pursuant to s.162H of the Act, to appeal to this Court.

The land to which the appeals relate is situated on the Karikari Peninsula on the east coast of the far north of New Zealand. That peninsula projects into the Pacific Ocean between Rangaunu Bay to its west and Doubtless Bay to its east. It is a remote part of the country, some 5½ hours by road from Auckland and 150 kilometers north of Whangarei which is the closest city to it. There is only one road leading to the peninsula from State Highway 10. This road is 15 kilometers long and all but one kilometer of it is unsealed. The peninsula has a long coastline containing bays, inlets, ocean beaches, shell banks, rocky headlands and cliffs. There are numerous islands off shore. According to a report made by the Department of Lands and Survey in 1979 the peninsula was formed by the complex motion of ocean

currents which deposited sediments to create a bridge of sand and silt between the then existing mainland and an outlying group of islands. The resulting land formation is predominantly low lying swamp and swamp-covered sand although some parts, the remnants of the islands, rise to a height of 185 metres.

There are relatively few people living on the peninsula. At the time of the 1981 census, the latest statistical information available to the Tribunal at the hearing before it in September and October 1985, there were only about 300 people living there, but that number may have increased since. The main settlement is at Whatawhiwhi-Tokerau beach, where there are 700 residential sites. Only 140 of these have buildings on them but the relevant zoning under the Mangonui Council's District Scheme would permit approximately another 600 building lots.

The Karikari peninsula was the home of the Ngati Kahu people although their landholding there is no longer very extensive. There is one small Maori community and a marae on the eastern side of Whatawhiwhi and another at Merita further north. No public access to the Karikari beach exists at present but there are two informal camping grounds in the area. Otherwise the natural environment is largely preserved.

In 1978, as a result of approaches to it by a developer,

the County Council proposed a change to its then operative district scheme to provide support "in principle" for the establishment of "a major self-contained tourist resort centre on the Karikari Peninsula which will cater for both overseas and New Zealand residents with a wide range of accommodation facilities, supporting services and attractions". The land affected was owned by the Doubtless Bay Development Company ("the company"). The proposed change was the subject of objections and appeals. The latter were determined by the Planning Tribunal on 1 October 1979 in a decision reported as Burkhardt & Ors v. Mangonui County Council [1979] 6 NZTPA 614. The Tribunal concluded that the concept was not then sufficiently advanced to justify recognition in the Scheme Statement. It said:

> ... it is not yet possible for this Tribunal to determine the questions whether, in the light of sections 3 and 4 of the Act, there is the need for a "total resort" in the district (or indeed whether there is the need for any other form of tourist development not already permitted by the District Scheme); and if so, whether it should be on the Karikari Peninsula. Issues of that kind cannot be decided in the abstract.
>
> If in due course those interested in promoting such a development on the Karikari Peninsula persuade the respondent to initiate a change to its District Scheme, or to incorporate certain provisions in a review of its District Scheme, having the effect of rezoning certain land, then that specific proposal can be evaluated in terms of the requirements of sections 3 and 4 by the process of objection and appeal.
>
> ... But the respondent identified the Karikari Peninsula as the most likely place for a major new tourist resort largely on an intuitive basis. We have concluded that even the more neutral form of words proposed to us goes too far in so identifying the Karikari Peninsula; and that until full studies have been completed and evaluated, that matter should be left open in the District Scheme. However some change to the Scheme Statement is called for. We have therefore modified and in part rewritten the further revision tended to us at the hearing.

The change to the Scheme Statement permitted by the Planning Tribunal recorded that:

> Interest has been shown in establishing a major tourist resort on the Karikari Peninsula. The development proposals are only at the conceptual stage and when evolved further may be of regional and national interest. At the present time there is insufficient detail available to assess clearly the likely impact of a specific proposal. There are many questions and problems that require detailed investigation study and evaluation before any land on the Peninsula is rezoned for a tourist resort.
>
> ... In any tourist resort development within the county the investigations and studies connected therewith must be carried out at the developer's expense and must relate to the total development envisaged in the long term, even though it may be appropriate to carry out the development in stages.
>
> So as to establish guidelines for the investigations and studies that are required, the Council hereby sets out the matters which must be adequately dealt with and submitted to it with any proposal for the development of a tourist resort:
>
> (i) Need for a Tourist Resort;
>
> (ii) Suitability of the area for a tourist resort and the reasons for development away from existing urban zoning;
>
> (iii) Development Plan; ...
>
> (iv) Services; ...
>
> (v) Erosion control; ...
>
> (vi) Impact:
>
> (a) physical
> (b) social; ...
>
> (vii) Items of Natural Beauty and Historic Interest" (pages 619-621).

After the Burkhardt decision, the company submitted a development statement to the County Council in support of a request for the rezoning of part of its land to permit a

tourist resort. In September 1983 a proposed review of the district scheme was published by the County Council. That review did not include any zoning provision for a new tourist resort on the peninsula. But in January 1984, as a result of information supplied by the company, the County Council resolved to vary the district scheme by including provisions for a resort. The variation, Variation No. 1, was publicly notified on 1 May 1984. There were objections to it, including one from EDS which asked that the proposed variation be abandoned. After hearing the objections the County Council resolved to allow Variation No. 1. But it acknowledged that there was a need for conditions and amendments to be made to the variation. It resolved to include them in a further variation, Variation No. 4, which made additions and amendments to the earlier variation. It publicly notified the new variation. EDS and others objected to it. The County Council disallowed the objections. However, it met some of the points of concern voiced by the objectors in that it recorded in the variations its intention to set up a "Karikari Advisory Sub-committee" and a "Karikari Joint Committee of Management", the functions of the subcommittee being to monitor the impact of the development and the function of the committee of management being to deal with the functioning of the resort and its integration with the community. The committee was to comprise representatives of the County Council, the developer, the resort operator, the Ngati Kahu people and the local community.

The development for which the variations provided was to be in three stages. As defined in the variations the scale and stages of development were to be as follows:

First Stage

One or more hotels to a total of 200 rooms
Four motels
) in Area 7 shown on Map 2

One fully serviced camping ground to accommodate at least 200 berths (adjacent to Area 7).

An 18-hole international size golf course including club house facilities; and up to 200 tourist accommodation units adjoining the course (in Area G).

An initial commercial development of at least one general store, one food shop, service station and Post Office facilities (in Area Co).

Provision for public access to Karikari Beach and other areas.

An equestrian centre

Recreational facilities including squash courts, tennis courts and buildings for indoor recreation (in Area Co).

An initial development of beach services (in Area B).

Second Stage

Up to a further 200 tourist accommodation units adjoining the golf course.

Further facilities attendant to the golf course itself to be constructed such as extensions to the club house together with restaurant and conference facilities.

Construction of lake areas and up to 300 lakefront tourist accommodation units.

One tourist village to be constructed to accommodate some 300-400 tourist accommodation units.

Up to an additional six motels.

Extensions to the commercial centre to be carried out which will involve the building of further service shops, craft shops and additions to the existing retailing set-up.

A further camping ground.

Extensions to the equestrian centre and other facilities for the riding school.

One or more hotels of a room total not exceeding 200 rooms.

Further development of beach services.

Third Stage

A further camping ground.

Up to a further 300 lakefront tourist accommodation units.

Additional tourist village of some 300-400 tourist accommodation units.

Additional facilities of a recreational nature to be installed where appropriate either by the commercial centre or adjoining the existing hotel facilities.

Up to one or more hotels of a room total not exceeding 200 rooms.

The Scheme Statement also records that for the purposes of utilities planning, the approximate capacity "visitor population" generated by the development would be:

| | | |
|---|---|---|
| Stage 1 | 2,280 | (Amended to 2,280 |
| Stage 2 | 4,840 | 4,240 |
| Stage 3 | 3,560 | 2,960 |
| Total | 10,680 | 9,480) |

(The population of Mangonui County and Kaitaia Borough was stated to be approximately 14,500.)

As the district scheme stood prior to the variations, a development of the kind contemplated by the three stages was not permitted under the ordinances applicable to the various zones in which the company's land was situated. That part of the company's land which was within 800 metres of the coast was then zoned Rural C. The balance of its land was zoned Rural A. The Rural A zone permitted the use of the land for motels, hotels and camping grounds. These uses

were not permitted in the Rural C zone. The Rural C zone provided for "the conservation of the coastal environment by applying design criteria to create harmony between proposed buildings and their natural surroundings, ... and by excluding incompatible uses". Part of the company's land within 800 metres of the coast was within the Rural C zone.

The effect of Variations 1 and 4 was to rezone 288 hectares of the company's land into zones other than Rural A, C or E. The 288 hectares includes the proposed golf course of 77 hectares, and proposed artificial lake of 58 hectares. Most of the company's land was to be included in a special zone - the Karikari Tourist Resort Zone, the zone statement for which provided "This zone, which is composed of a number of dispersed development areas, provides for the development of tourist accommodation and services for an integrated, self-contained, fully serviced tourist resort". Part of the land was to be rezoned Rural E which was a special zone to provide for the treatment and land disposal of sewage. All the provisions of the Rural C zone would apply in the Rural E zone, with the addition of sewage disposal works and an equestrian centre as permitted areas. The remainder of the company's Rural A land affected by the variations would be rezoned as Rural C. But there was a note in the ordinances of the Karikari Tourist Resort Zone which read "Until the Council brings down an appropriate change to the District Scheme ... only those developments comprised in Stage 1 ... may proceed except as provided for

under conditional uses". Conditional uses for the zone included "any use listed (in the scheme statement) as part of Stage 2 or Stage 3 development ...". But certain conditions precedent to consent were specified.

EDS and the Maori Council appealed to the Tribunal against the variations. The Tribunal heard evidence on the appeals over six days. In its reserved decision it concluded that a rezoning to the extent of Stage 1 only of the proposed development was justified on the evidence; that all references in the district scheme to Stages 2 and 3 should be deleted; and that the balance of the company's land must be zoned in a manner which did not permit any of the uses permitted in Stage 1. It did not think that the zoning provisions and the performance standards relating to the beach community service development area were appropriate because the area, one of dunes, was extremely sensitive. The Tribunal then requested the County Council to modify the contents of the variations and to supply a copy of the modifications to the Tribunal and other parties. The Council did so and on 14 March 1986 the Tribunal made a formal order allowing the appeals of EDS and the Maori Council in part. However, the substance of the Tribunal's decision was to permit the establishment of a resort on the peninsula to the extent of Stage 1 of the development and it was against this that EDS and the Maori Council appealed to the High Court on points of law.

There was considerable evidence given in the lengthy hearing before the Tribunal. From this two opposing points of view emerged. One which favoured the development of the area claimed that New Zealand needed what are known as "destination resorts" to broaden the tourist industry's product range and market appeal; and that there was room for such a resort in the Karikari peninsula area. (A destination resort is one in which a tourist stays for the whole time he is a tourist in this country. The one resort caters for all his needs). As one witness put it:

> A destinational beach resort would demand a site which provided enough land for a major development, access to a beach which was sandy and safe for swimming and sailing, and a variety of other coastal environments such as secluded bays and diving waters. These water based activities should be complemented by land based facilities providing for golf, tennis, horse riding and other participatory recreational activities. In addition to these resort-provided activities, the visitor would also demand day excursions to other points of historical, cultural and scenic interest.

Those who held this view claimed that there was a place for such a resort in the Northland, on the Karikari peninsula in particular, and that the development of such a resort would confer social and economic benefits on the district, particularly in relieving unemployment and stopping the movement of people away from the area.

The company called a witness to support that view. He was a landscape architect who was commissioned in 1981 to consider a proposal for the development of the area. He identified three distinct areas in the company's land, namely:

1. The beach and foredune area;

2. An extensive swamp and wetland area behind the foredunes and river flats at the eastern end.

3. Higher scrub covered land rising behind the area in (2).

He recognised that the beach and foredune area were environmentally sensitive and would be easily damaged; that the whole of it must be left untouched; that the micro-climate of that area was relatively hostile; and he recommended that the development be sited in the various positions shown on maps put in evidence before the Tribunal. He said that his proposals sought to achieve the preservation of the areas of high natural beauty and interest, to ensure the protection of land that was environmentally sensitive, and to build the development around the natural attributes of the land, thus maintaining the integrity of the landscape and ensuring the survival of the very elements that attracted development in the first place.

The case for development was also supported by an officer of the Tourist & Publicity Department called by counsel for the then Minister of Works and Development. He gave an overview of the tourist industry, saying that there was a segment of the international tourist market which sought a destination resort of the kind of a "stay-put", all-inclusive holiday at a single resort. He suggested that there should be three such resorts in New Zealand of which a beach holiday in a warm and secluded area was one.

The contrary view was advanced by EDS and by the Maori Council. EDS seeks the preservation of the whole of the natural wild and rural character of Karikari Beach and its protection as a wildlife habitat. It claims that this can only be achieved by the acquisition of the beach and dune area by some public agency and the exclusion of the public from a large part of it. It sees the company's development as an unwarranted intrusion into a vulnerable natural environment.

The Ngati Kahu people also expressed their opposition to a large scale resort at Karikari. They did so through the Maori Council which was set up pursuant to the Maori Community Development Act 1962. In essence their concern is to preserve their existing lifestyle. They see a large-scale resort as detrimental to their way of life. They do not oppose development or change if it is sound and in conformity with their lifestyle and culture. They favour a smaller locality-related development which would fit better into the existing communities on the peninsula. They say that the beach and dunes in the area are of particular significance to the Maori people and that they contain a number of archaelogical sites. They oppose the development proposed as imperilling their own cultural values and their ability to relate to their land.

The case for the conservation of the area was supported before the Tribunal by the evidence of a number of

witnesses. One with high qualifications in ecology said that the beach and duneland and the swamp and wetland behind them were interconnected areas of high floral and faunal value; that they have a number of nationally important floral and faunal features; that the high natural values of these areas would be threatened by the proposed development; that in particular, large numbers of people on the beach would cause severe damage to the dune and vegetation and affect the summer breeding of the New Zealand dotterel. He also spoke of the effects which changes to the hydrology and fertility of the swamp and wetland would have, and of the effects of run-off from site preparation and the effects of excavations for the proposed lake. Evidence of possible adverse effects on the beach, dunes, swamp and wetlands was given by the Wildlife Service.

There was also evidence from a witness experienced in tourism that development, even to Stage I, could result in an intrusion into the area of a development that could not be sustained, resulting in an unsuccessful development which would irretrievably alter the natural environment.

The decision of the Tribunal notes that those supporting the variations did not call any evidence to establish that there was anyone with sufficient financial resources ready and willing to undertake the variations should they be upheld, a point on which counsel for EDS based a submission that the Tribunal was unable to judge whether the proposal

would represent wise use and management of resources, to which s.3(1)(b) of the Town and Country Planning Act is directed. The Tribunal ruled against this submission. I refer to it later. It held that the availability and source of those resources were not questions which land use planning could examine and that while land use planning must examine questions of need, zoning can only provide opportunities which may or may not be taken up.

In its decision upholding the variations to the point where they permitted development of the company's land to Stage 1, the Tribunal concluded that applying the requirements of ss.3 and 4 of the Act, which are set out and discussed later in this judgment, there was justification for making zoning provision for a new tourist resort to the extent of Stage 1; that there was a place for such a resort in New Zealand tourism and that it should be in the Northland; that there was no case for suggesting that a destination resort should be attached to an existing tourist community in Northland; that while, if a sufficient degree of new market for such a resort were not generated, it could have an adverse effect on the existing tourist infrastructure, land use planning should give the opportunity for someone to take that risk if their market research indicated it was justified; and that a well planned tourist development in the Mangonui County might significantly relieve local unemployment from which the County suffers and promote the development which it needs. But the Tribunal said that "it

was only a possibility" that a destination resort would have significant social and economic effects on the district in general and the local community in particular.

In the course of the hearings before the Tribunal, the High Court and this Court the various issues have been highlighted and refined. In the High Court the issues were further refined, perhaps over refined, and Chilwell J noted that counsel had framed no less than 16 points of law for him to decide.

In his judgment Chilwell J analysed the Tribunal's decision and divided the questions of law arising from it into three principal categories. The first, whether the Tribunal had evidence upon which it could reasonably conclude that there was a place for a destination resort in New Zealand tourism and whether that place should be in the north. The second concerned the interpretation and application of sections 3 and 4 of the Town and Country Planning Act 1977. The third concerned the function of the Tribunal in hearing and determining appeals of this type.

On the first question he concluded that the Tribunal could reasonably have concluded on the evidence before it that there was a place for a destination resort in New Zealand tourism, and that it should be in the north. On the second he concluded that the Tribunal had correctly

interpreted and applied s.3(1)(a), (b), (c) and (g) of the Act. On the third he upheld its approach to the matter of appeals.

The issues raised on this appeal arise from certain findings of the Tribunal although on one issue, whether the land is Maori ancestral land, the complaint is that the Tribunal made no finding at all. The relevant findings of the Tribunal can be summarised as follows: That the development would add a massive and abrupt dimension to growth on the peninsula; that the resultant change would be substantial and would have regional and national significance even if developed only to stage 1; that such change could be overwhelming and destructive by its very size; that the accommodation capacity of stage 1 was expected to reach 2280 people, as against the present population of only a few hundred; that the promotion of the new destination resort involved very considerable risk and that market demand and support must be generated; that if a sufficient degree of new market support were not generated the development could have an adverse affect on existing tourist infrastructure; that it was only a possibility that a new destination resort would have beneficial social and economic effects; and that there was no evidence that there was anyone available with sufficient financial resources to develop the resort.

Although the case undoubtedly raises important points of planning law and environmental considerations, essentially

it depends on the construction of s.3(1), particularly (a), (b), (c) and (g), of the Act and its application to the findings of the Tribunal. Section 3 provides:

> (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:
>
> (a) The conservation, protection, and enhancement of the physical, cultural, and social environment:
>
> (b) The wise use and management of New Zealand's resources:
>
> (c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:
>
> (d) ....
>
> (e) ....
>
> (f) ....
>
> (g) The relationship of the Maori people and their culture and traditions with their ancestral land.
>
> (2) The Minister may exercise all such powers as are reasonably necessary for promoting, in accordance with the provisions of this Act, matters of national interest and the objectives of regional, district and maritime planning.

Section 4 should also be mentioned. It provides:

> (1) Subject to section 3 of this Act, regional, district, and maritime planning, and the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social and general welfare of the people, and the amenities, of every part of the region, district, or area.

(2) The general objectives of regional district, and maritime schemes shall be to achieve the purposes specified in subsection (1) of this section.

(3) In the preparation, implementation, and administration of regional, district, and maritime planning schemes, and in the administration of Part II of this Act, regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967.

All counsel made submissions as to the place to be given to s.3 in the scheme of the Act. Mr Robinson appeared in the High Court for the Minister of Works and Development pursuant to the Minister's role as representative of the Crown for the purposes of the Town and Country Planning Act. With the abolition of the Ministry of Works and Development on 1 April 1988, the responsibility for the conduct of this appeal passed to the Minister of Conservation whose instructions to Mr Robinson were that she wished to add nothing to the submissions made by the appellants which Mr Robinson adopted on the Minister's behalf. The substance of other counsels' submissions was as follows:

E.D.S Submissions

In considering s.3 Chilwell J adopted a passage in the judgment of Wild CJ in Minister of Works v. Waimea County [1976] 1 NZLR 379 to which I refer later. In substance Chilwell J said that s.3 was not to be given primacy but must be read in the context of the Act as a whole. Mr Curry submitted that the Judge's approach was wrong. While he did not contend that s.3 should be given absolute primacy and

acknowledged that conflicting interests under the Act should be balanced he submitted that this should be done only in the light of the overriding principles of s.3; and that s.3 imports a presumption in favour of national importance.

Section 3 did not appear in its present form in the Town and Country Planning Act 1953. There was no provision in that Act relating to matters of national importance. They were added to the legislation by s.2 of the Town and Country Planning Amendment Act 1973. Section 2B provided:

> 2B The following matters are declared to be of national importance and shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes:
>
> (a) The preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:
>
> (b) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:
>
> (c) The prevention of sporadic urban subdivision and development in rural areas.

Section 2B was discussed by Wild CJ in Minister of Works v. Waimea County. He said:

> The object and scope of s.2B is perfectly plain both from its place in the scheme of the Act and also from its language. It is to be read together with and deemed part of the Act, and it is noteworthy that it was inserted at the beginning of the Act, after the short title and the two sections dealing with interpretation and the liability of the Crown. It precedes part I

> which deals with regional planning schemes and part II which deals with district schemes. Apart from the clear indication in the insertion of s.2B in that position in the Act, the section itself declares in terms that the three topics it prescribes "shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes". That means just what it says. It follows that every council and every appeal board or other authority acting under the Act must do what s.2B requires. But s.2B must be read with all the other provisions because the Act must be read as a whole. Section 18, which opens part II of the Act, declares what shall be the general purpose of every district scheme. In the same way s.3, which opens part I, declares what shall be the general purpose of every regional planning scheme. Authorities acting under the authority of the statute in regard to regional planning schemes or district schemes must, therefore, have regard to s.3 or s.18 as the case may be. (382)

In Smith v. Waimate West County Council [1980] 7 NZTPA 241 ~~259~~, a case decided after the 1977 Act was passed, the Tribunal accepted a submission that s.3 must be read in the context of the 1977 Act as a whole and that it did no more than "make explicit what was previously implicit" - a view which Chilwell J adopted. Mr Curry submitted that greater weight is now to be given to the matters of national importance mentioned in s.3 than was the case under s.2B. He referred to a passage in Palmer, Planning and Development Law in New Zealand vol. 1 p.202 in support of that proposition.

The place which s.3 occupies in the legislation can best be determined by reference to the stages in its statutory evolution. Section 3(1) of the 1953 Act provided that every original planning scheme should have for its general purpose the conservation and economic development of the

region to which it related but, as stated, it made no reference to specific matters of national importance. Section 18 of that Act, which was also relevant, provided that every district scheme should have for its general purpose the development of the area to which it related in such a way as would most effectively tend to promote the health, safety and convenience in the economic and general welfare of its inhabitants in the communities in every part of its area. The text of s.2B has already been given. It introduced the concept of national importance which is the hallmark of s.3 of the 1977 Act. The difference between s.2B and s.3 is that in s.2B the matters mentioned as being of national importance were limited to:

(a) The preservation of the natural character of sea and lake and river margins and their protection from unnecessary subdivision and development;

(b) The avoidance of urban development on land which had a food producing value;

(c) The prevention of sporadic urban development in rural areas.

Section 3 considerably widened the scope of the matters recognised as being of national importance by adding new paras. (a), (b), (f) and (g). Paras. (c), (d) and (e) of s.3 repeat paras. (a), (b) and (c) of s.2B. And the scope of s.4 of the 1977 Act was made wider than s.4 of the 1953

Act. But undoubtedly while the scope of the matters listed as areas of national importance were considerably enlarged by s.3, the real question is whether those matters are to be given any special priority or weighting over other planning considerations mentioned in the Act. Mr Curry submitted that this was so; that whereas s.2B was a section, albeit an important one, which took its place in the scheme of the previous legislation, in the 1977 Act its primacy has been emphasised in that certain other sections, namely s.4 (already cited), s.36 (contents of district schemes) and s.72 (conditional uses) have been made subject to it.

It would, however, be too much to say that s.3 has been given absolute primacy in the Act. To do so would be to suggest that it takes precedence over all other planning considerations and would require its application as a matter of principle as the single dominating factor to which all other statutory provisions and all other planning considerations were made subordinate. Section 3 is not expressed in such downright terms. Indeed, Mr Curry did not contend for such an absolute construction. But even a contention that, short of absolute primacy, s.3 must be treated as containing a principle that overrides other planning considerations is an overstatement of the position.

But that is not to write down its obvious force. Some sections, namely 4, 36 and 72, are made expressly subject to it. And, apart from its special application to them, s.3 in

its very terms transcends the territorial limitations of regional and district and maritime schemes. The considerations which s.3(1) treats as the matters of national importance must be "recognised and provided" for in every regional, district and maritime scheme. The phrase "be recognised and provided for" is stronger than the phrase "regard must be had to". Every scheme must cover, inter alia, the matters of national importance listed in s.3(1). It follows that unless it is plain from the terms of a scheme that the matters listed in paras. (a) to (g) have been identified and provided for, the scheme will be in breach of s.3(1). Every council must do what the section requires. What s.3(1) has done is to increase the number of matters which the framers of the statute consider to be of national importance; all of which matters any thoughtful citizen, I think, would accept to be such in any case.

The difficulties of this case lie not in deciding whether or not s.3 should receive primacy or any special weighting over and above other provisions of the Act but in the application of paragraphs (a) to (c) and (g) and the balancing of some of the matters mentioned as being of national importance against others. There will be some cases where that balancing will be even more difficult. For instance, in a coal mining area the wise use and management of New Zealand's resources (para. b) will have to be balanced against the conservation, protection and enhancement of the physical, cultural and social environment (para a) and the

preservation of the natural character of the coastal environment and the margins of lakes and rivers and their protection from unnecessary development (para c). The very use of "unnecessary" makes it clear that the preservation of the natural character of the coastal environment and the margins of lakes and rivers is not a bar to necessary development.

For these reasons the Tribunal was right when it said in its decision:

> Tourism does not guarantee the protection of the natural environment. It can be destructive of that environment. Section 3(1)(c) requires land use planning to preserve the natural character of the coastal environment and to protect it from unnecessary subdivision and development. (By way of comment on that requirement, we say that it does not require that land use planning give absolute protection to the natural character of the coastal environment, else there would be no subdivision or development at all in that environment.)

Having referred to the matter just discussed, namely the place of s.3 in the legislation, Mr Curry went on to submit that the Tribunal had failed to apply its provisions properly to the facts. He directed his submissions to a number of heads:

Section 3(1)(a)

He referred to findings by the Tribunal as to the possible gains and detriments resulting from the development of a destination resort on the peninsula. The Tribunal expressed these as follows:

> "We are of the opinion that .... tourism, and in particular a new destination resort, may significantly reduce local unemployment and underdevelopment. The possibility that it will have those beneficial consequences on the district has weighed heavily with us in coming to the conclusion that land use planning should give the opportunity for someone to develop such a resort, to the extent of stage 1. (However, we repeat that it is only a possibility that a destination resort will have beneficial social and economic effects on the district in general and on the local community in particular, a resort could be successful from the developer's point of view yet unsuccessful in terms of its effects on the district and community).

In summary, the Tribunal was only able to rate the beneficial effects deriving from a destination tourist resort in the area as a possibility.

Mr Curry contended that in having regard to the supposed benefits which were no more than a possibility, the Tribunal had given insufficient weight to the reference in s.3(1)(a) to "the conservation, protection and enhancement of the physical, cultural and social environment". He said that s.3(1)(a) required the establishment of more than a mere possibility of beneficial social and economic effects on the district; that the Tribunal had to reach the conclusion that these benefits were made out to the point of being probabilities before they could displace matters declared by s.3(1)(a) to be matters of national importance; and that in accepting a lesser standard than this the Tribunal had not applied s.3(1)(a) correctly.

This submission can conveniently be considered with the submission by Mr Curry made under s.3(1)(b).

Section 3(1)(b)

In a passage already cited, the Tribunal referred to the considerable risks involved in the promotion of a new destination resort and the need to generate market demand and support. It also noted that those who supported the variations had not called any evidence to establish that there was anyone with the financial resources ready and willing to undertake the development should the variations be upheld. But it ruled against an EDS submission that in the absence of such evidence the Tribunal was unable to judge whether the proposal would represent the wise use and management of New Zealand's resources. The Tribunal's ruling followed its previous rulings that s.3(1)(b) speaks principally of New Zealand's "land resources" (the emphasis is the Tribunal's), and that the question was whether it would be a wise use and management of the land affected to allow it to be put to the purposes proposed in the variations, the source of the resources to develop the land, even their very availability, not being questions which could be examined under land use planning. The Tribunal had expressed that view in Smith v. Waimate West County [1980] 7 NZTPA 241. And, in a number of cases since, it has adopted it.

Chilwell J considered that the principle was so entrenched in the cases that it would be wrong now to hold that the Town and Country Planning Act is not confined to land use planning.

Before examining Mr Curry's submission further, I would agree with him that the resources, the wise use and management of which must be recognised and provided for, are not to be narrowly construed. Obviously in a statute which deals with land use planning the enquiry will centre on land use. Land use in a narrow sense is generally at the core of every application under the Act. But land use in a planning background is a term of wide import. Water in the sea, rivers and lakes, the air around us, the climate of an area, a particular configuration of mountains or valleys, the growth of a forest are all resources in the wider sense. Land use should be construed as including all these things.

Chilwell J said that there should rarely, if ever, be instances where the Tribunal need enquire whether or not there is a person with the financial resources ready and willing to undertake a permitted development; that a council in the first place and the Tribunal on appeal are entitled to assume that if a person decides to develop the land in compliance with a particular zoning, it will do so with the objective of financial success. This, too, was the view advanced by Mr Robinson when he appeared in the High Court as counsel for the Minister of Works and Development. Mr Curry submitted that because there was no evidence of the availability of anyone with financial resources ready and willing to undertake the development, the Tribunal should have refused it. With that submission he joined issue with the line of authority already referred to, although he

acknowledged that in some of the cases (Smith v. Waimate West County, Chelsea Investments Ltd v. Waimea County [1981] 8 NZTPA 129 and Re an application by New Zealand Synthetic Fuels Corporation Ltd [1981] 8 NZTPA 138) the Tribunal had detailed evidence of the proposed use.

The concerns underlying this submission are understandable. It would be a serious thing if a development of the scale envisaged here, even to stage 1, were to fail for economic or other considerations. What would be left by the failed development might be a blot on the landscape and possibly demonstrate that the proposed development had been an unwarranted intrusion into the natural environment in the first place. This was a matter which the Tribunal had to weigh when considering whether, or to what extent, the district scheme should be amended. But the absence of evidence that there was a person available to undertake such a development was not fatal to the scheme. In some cases the possibility that a particular development which underlies a proposed scheme change or zoning will ever be undertaken may be remote. In that case a change in zoning may be unjustified. But, where there is a reasonable possibility that the particular development underlying the projected change will take place, a council and the Tribunal are entitled to weigh its merits and allow the change even if no person is shown to be presently available to undertake the development. It is undesirable to lay down a general rule. Each case must depend on its circumstances. But here

the Tribunal addressed itself to the issue with s.3(1)(a) and (b) in mind and it was entitled to conclude that provision should be made in the scheme against the reasonable possibility that proper financial backing for the enterprise would be forthcoming.

Section 3(1)(c)

The Tribunal found that the destination resort concept was one which had to be marketed in order to generate market demand and support. Mr Curry submitted that s.3(1)(c) was concerned with the establishment of a present need for development, not one which may be generated in the future; that any justification for taking advantage of an opportunity to develop is not the establishment of a need; but that even if a case could be made for a future need that need would require to be demonstrated at least to the point of probability.

Section 3(1)(c) does not specifically refer to need but need does by implication arise in the reference in the subsection to "unnecessary" subdivision and development, thereby recognising the point made earlier that there may be necessary subdivisions and developments that impinge on the natural character of the coastal environment and the margins of lakes and rivers to which s.3(1)(c) has no special application. Section 3(1)(c) does not impose absolute requirements in regard to subdivision development, but rather requires all schemes to provide for the preservation

of the natural character of the features it mentions against "unnecessary" subdivision and development. This requires those responsible for any scheme to engage in some forward thinking. If schemes can take account of only those developments which are shown to be certain developments planning will be restricted. The drafting of a scheme may be greatly hampered and restricted if those responsible for it cannot look ahead at what may reasonably be projected. Planning is about looking ahead more than looking behind. It is at least as concerned with the desirable developments of the future as it is with the preservation of the desirable developments of the past. For these reasons I do not think that the Tribunal fell into error in permitting the variations even though the development was not shown to be more than a reasonable possibility.

The Maori Council Submissions

I now turn to the case for the Maori Council which in the submissions made on its behalf was closely identified with EDS. Miss Elias said that the Ngati Kahu people believed that the Karikari peninsula was the landfall for the canoe which brought their ancestors to New Zealand and it was there they first settled. (See also the Mangonui Sewerage Report, Waitangi Tribunal 1988 para. 1.2). The Maori Council's concern is to see that decisions for the development of the peninsula are made with care and having regard to the relationship of the Ngati Kahu people with the land. Miss Elias said that they accept that soundly based -

development is necessary but wish to ensure that it is in conformity with their lifestyle and culture. They are opposed to the development contemplated in the variations and regard it as unsound and threatening to their culture. In particular, the Maori Council is concerned with (i) the social and cultural impact of the proposal (s.3(1)(a)); (ii) the impact of the development on the coastal environment (s.3(1)(c)); and (iii) the relationship of the tribe with their ancestral land (s.3(1)(g)).

Section 3(1)(a)

Reference has already been made to the submissions made by Mr Curry under this head. They received the support of Miss Elias and need not be discussed further.

Section 3(1)(c)

It was the Maori Council's case that s.3(1)(c) is equivalent to a legislative judgment that the coastline is to be protected against development which is unnecessary. Miss Elias submitted that it was not correct to suggest, as she said Chilwell J had in his judgment, that it is only in circumstances in which the natural character of the environment is particularly important that the Tribunal may require compelling evidence of need before commencing the balancing exercise which led him to accept the Tribunal's approach distinguishing between dunes and swamp on the one hand and the higher ground behind the beach on the other even though all this land was found to be within the general coastal

environment. In essence she submitted that it was not for the Tribunal to grade the coastline before giving it the protection required; that all the coastal environment was to be protected from unnecessary development; that where development is necessary the qualities of the coastline will be relevant to the balancing of advantages and disadvantages in the proposal; that where the benefits of the necessary use so outweigh the detrimental effects of the development on the coastal environment the development will prevail; that, in appropriate cases where necessity is established the impact of the use can be minimised by confining it and by prescribing conditions; but that the balancing stage is not reached unless the development is first shown to be necessary.

I do not think that this approach follows from the wording of s.3(1)(c). That provision has the aim of preserving the natural character of the coastal environment and the margins of the lakes and rivers. As already noted, by implication it recognises that there will be some development which is necessary. There can also be development which is unnecessary and which may not interfere at all with the natural character of the coastal environment or may interfere with it in only an insignificant way. Such may result from the way in which the development is planned. In the present case the Tribunal thought that by allowing the higher scrub covered land to be used for a destination resort, while preserving the beach and foredune area and the

swamp and wetland area, the object of s.3(1)(c) could be attained. Such a view does not run counter to s.3(1)(c) which does not place a prohibition on development. It merely provides that a council's scheme must make provision, inter alia, for the matters covered by s.3(1)(c). Whether a scheme does that adequately or does it at all is a question to be decided in the light of the circumstances of the case. Even though the Tribunal did not find the development, even to the point of stage 1, to be necessary, I think that its decision fairly reflected the concerns expressed in s.3(1)(c).

Section 3(1)(g)

No definition is given in the Act as to what is ancestral land. Miss Elias said that she invited the Tribunal to find that the company's land was ancestral land within the meaning of s.3(1)(g) and to overrule its earlier decisions that s.3(1)(g) applies only to ancestral land still in Maori ownership. There have been a number of cases where the Tribunal has taken that view. In Knuckey v. Taranaki County Council 6 NZTPA 609, the Chairman of the Tribunal ruled that ancestral land in that particular case was land which, regardless of legal tenure, belonged to or was vested in or reserved to a particular tribe, and by operation of law and/or custom was owned by or regarded as owned by or was capable of being owned by the present members of that tribe and their descendants as one entity, and was associated historically with the burial of ancestors as distinct from land an individual or group of individuals might legally

dispose of to other specified individuals to the exclusion of tribal members as a whole. And in Quilter v. Mangonui County Council 296/77 and 38/78, decision 21 July 1978, the Tribunal held that land which had passed into the ownership and occupation of people who are not Maoris does not qualify as ancestral land. That, too, was the view taken by Chilwell J in the present case. But in Royal Forest & Bird Protection Society (Inc) v. W.A. Habgood Ltd 12 NZTPA 76, decided on 31 March 1987 (that is, after the Tribunal had given its decision in the present case) Holland J held that it was wrong to confine "ancestral land" to land now owned by Maori people. He disapproved of what had been said to the contrary in Knuckey and Quilter. He said that ancestral land is land which has been owned by ancestors although not necessarily still in the ownership of the Maoris. I am largely in agreement with the approach adopted by Holland J. In the absence of any statutory definition, and on the plain meaning of the words, ancestral land is land which was owned and occupied by one's ancestors. Whether it is only land which was occupied by the first arrivals in New Zealand in the canoes is a question I leave open as it is not presently relevant. In some contexts it might be reasonable to assume that ancestral land which has since been disposed of is not ancestral land; that it must still be owned or possessed by the descendants of those ancestors and the chain of ownership or occupation maintained through successive generations. But s.3(1)(g) does not speak of present day ownership of ancestral land by the Maori people; only of the relationship

of the Maori people and their culture and traditions with ancestral land. That phraseology contemplates an association with ancestral land which is much wider than present day ownership or possession. That is one reason why I think that the words "ancestral land" where used in s.3(1)(g) should not be read down to exclude ancestral land which has passed out of Maori ownership or occupation. Another reason, allied to it, is that the very use of the word "ancestral" is a reference to the past and not to the present so that the emphasis is on a state of ownership or occupation which pertained in years, perhaps centuries, gone by. The fact that it no longer pertains does not make it any less ancestral. However, the circumstances in which the ties of ownership or occupation of ancestral land have been severed may be very relevant to the question of "the relationship of the Maori people and their traditions and culture with their ancestral land". If there has been a voluntary disposition in the past by Maoris to Europeans the considerations made relevant by s.3(1)(g) may be considerably diminished in their impact. Therefore, for the purposes of considering s.3(1)(g), I would treat the land the subject of the development as Maori ancestral land which s.3(1)(g) made it obligatory for the County Council to recognise and provide for in the district scheme.

Mr Salmon said that no evidence had been given before the Tribunal that the land in question had been owned by the ancestors of the Ngati Kahu tribe. However, even in the

absence of such evidence, I am prepared to assume that the Karikari peninsula was the ancestral land of the Ngati Kahu people. And I cannot think that the Tribunal regarded it as otherwise. Miss Elias acknowledged that the proposed development met with the approval of the majority of the people on the peninsula and that the greater part of the tribe lived elsewhere in the north - principally around Kaitaia where better work opportunities are available. The Tribunal is likely to have had regard to these facts. But the concerns which the local Maori people expressed for the area were put quite strongly to the Tribunal and its decision shows that it had them in mind in considering whether or not to allow the appeals against the variations. It decided that these concerns could be protected. There was evidence to that end which the Tribunal was free to adopt. Mr B.W. Putt, a senior planner with the Ministry of Works, who gave evidence before the Tribunal, recognised that the Ngati Kahu people were the Tangatawhenua of the Karikari peninsula and that the whole area contained historic and archaelogical sites. But he said that these could be safeguarded through the consultative process and that traditional values can be protected as long as the change was not catastrophic.

In the end, I think as Chilwell J did, that the Tribunal did not misdirect itself on the law and that there was evidence to support its findings. The issues raised by the case are sensitive ones and have no doubt roused strong

feelings in the minds of the appellants. But the function of this Court is limited to considerations of law. It is not for it to make a fresh appraisal of the evidence which, not having seen and heard the witnesses, it would be ill equipped to do.

For these reasons I would dismiss the appeals.

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