Decision No **A 3 /94**

IN THE MATTER of the Local Government Act 1974

AND

IN THE MATTER of four appeals under section 300 of the Act

BETWEEN **BAY OF PLENTY REGIONAL COUNCIL**

(TCP 84/92)

First Appellant

AND **E H HARRISON and ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC**

(TCP 83/92)

Second Appellants

AND **B C MARSHALL and WHAKATANE FRIENDS OF MARUIA**

(TCP 85/92)

Third Appellants

AND **G J DICKSON and GREEN ENVIRONMENTAL SOCIETY**

(TCP 82/92)

Fourth Appellants

AND **WHAKATANE DISTRICT COUNCIL**

Respondent

AND **WAIMANA 251/252 TRUST**

Applicant

BEFORE THE PLANNING TRIBUNAL

His Honour Judge Bollard (presiding)
Dr A H Hackett
Mr J R Dart

HEARING at WHAKATANE on 20, 21, 22, 23, 24, 27, 28, 29 and 30 September 1993

APPEARANCES

Mr P H Cooney for the first appellant
Mrs E H Harrison in person for the second appellants
Mr B C Marshall in person for the third appellants
Mr G J Dickson in person for the fourth appellants
Mr A M B Green for the respondent
Mr T S Richardson for the applicant

INTERIM DECISION

1. Introduction and Background

It will be convenient to commence in the same vein as appears in Decision No A 108/93 (to which further reference is made shortly). Before the Tribunal are four appeals under s 300 of the Local Government Act 1974. It is common ground that under the transitional provisions of the Resource Management Act 1991 ("the 1991 Act") the appeals fall to be decided under the law existing prior to 1 October 1991, when the 1991 Act came into force. The appeals - one by the Bay of Plenty Regional Council ("the regional council") and three by local residents and certain other bodies, including the Royal Forest and Bird Protection Society of New Zealand Inc, claiming to be affected so as to have status - are from a decision of the Whakatane District Council ("the district council" or where otherwise plain from the context "the council"), granting consent to the Waimana 251/252 Trust

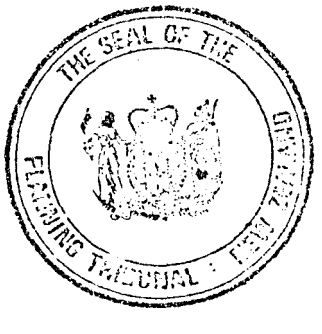
(hereafter variously called "the applicant" or "the trust") to subdivide certain land at Harbour Road, Port Ohope.

Decision A 108/93 records our oral determination after consideration of submissions received on the first day of the hearing in support of, and in opposition to, the appeals being struck out because of late filing. For the reasons given, it was concluded that an extension should be granted as to the late filing of all four appeals and that the motion to strike out should be declined. Again, at the outset, counsel for the applicant intimated that certain appellants were under challenge as to their status. That aspect was reserved. Submissions were advanced on the status issue in the openings of the appellants' cases and in final submissions by counsel for the applicant and the respondent. Acting on instructions, counsel for the applicant indicated that he wished to maintain opposition to the status of all the appellants. We later address the matter under heading six.

It will now be convenient to set forth the district council's decision and the reasons for it. Before specifying its formal resolution, the delegated committee which conducted the hearing recorded various considerations which it had weighed. Although not reproduced below, we have not overlooked their existence as a necessary prelude to the resolution. It should be clearly understood, however, that our decision arises out of a hearing de novo, so that the views expressed by us are those arrived at on the evidence and submissions presented on appeal.

The substantive part of the council's decision reads (subject to minor grammatical amendments):

> "RESOLVED
>
> 1. THAT pursuant to section 299(6) of the Local Government Act 1974, the objection lodged by Waimana 251/252 Trust in respect of Council's decision not to approve the proposed subdivision of Part Allotments 582 and 252 (balance) Waimana Parish Block 7V11 Whakatane Survey District, be upheld.
>
> 2. THAT pursuant to section 279(b) of the Local Government Act 1974, the said subdivision as shown on Scheme Plan 62642/11 be approved, subject to the following conditions:
>
> (i) That prior to any work being undertaken in respect of the subdivision, a contour plan clearly showing the finished levels be submitted to and approved by Council.



(ii) That the minimum finished ground level for residential development be RL 2.8 metres Moturiki Datum.

(iii) That the roading layout be developed in accordance with the Scheme Plan with formation levels to a minimum of RL 2.5 metres Moturiki Datum.

(iv) That the subdivider shall enter into, in favour of the Council, a memorandum of encumbrance to be prepared and approved by Council's solicitors at the cost at all things of the applicant for registration as a first charge against the titles to the lots shown on the scheme plan to record that no more than one household unit is to be erected on any lot and that no further subdivision of these lots will be permitted.

(v) (a) Where building platforms are required to be formed, they are to be a minimum of 400m^2 and a maximum of 800m^2.

(b) Building platforms are to be constructed to a minimum of 2.8 metres Moturiki Datum with sufficient fall to provide natural drainage of surface water.

(c) Such building platforms are to include vehicular access from roads and right of ways as well as all services up to the building platform.

(d) That an engineering certificate be provided by a registered engineer specialising in soil mechanics and land stability that all building platforms in the land and the remaining residential lots in the subdivision are safe and stable for an ordinary type residential building to be erected thereon and are compacted to a consistent maximum soil bearing capacity of 100kPA.

(vi) That power, telephone and water supply reticulation be in accordance with Council's standards with all services underground and water meters installed on the street frontages.

(vii) That no cutting or modification of the dune ridge located to the north of the site be carried out without the consent of the Executive Officer - Works and Services and the Chief Planner.

(viii) (a) That any earthworks be monitored by an approved archaeologist at the applicant's expense to record evidence of or identify archaeological sites.

(b) That where archaeological sites are known to be present, to identify during the earthworks (sic), the sites be not disturbed until the

developer has obtained consent from the Historic Places Trust pursuant to section 46 of the Historic Places Act 1980, to modify or destroy the archaeological site.

(ix) That all lots adjoining the reserve areas be fenced on the common boundary in consultation with and to the satisfaction of the Manager - Parks and Recreation.

[Note: no condition numbered (x) appears in the resolution]

(xi) That all works be carried out in accordance with Council's adopted subdivisional standard requirements unless modified by specific conditions herein or with the expressed consent of the Executive Officer - Works and Services.

(xii) That the engineering drawings to be submitted for approval contain full construction details of the proposed stormwater disposal system, such to be installed to the satisfaction of the Executive Officer - Works and Services.

(xiii) That the easements shown on Plan 62642/11 be created.

(xiv) That Lots 107 and 108 vest in the Council as road:

(xv) That any work on filling or recontouring the land adjacent to the eastern boundary of the site be carried out so as to ensure that there will be no run off of stormwater from the sections developed on to the adjacent reserve.

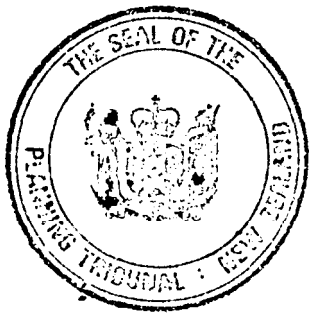
Reasons

1. The Council is satisfied that the development of the land as proposed and as outlined on Scheme Plan 62642/11 will not adversely affect any of the matters contained in section 3(1) of the Town and Country Planning Act 1977 as:

(a) The present character of the area is one of a developed coastal residential community.

(b) The Trust has demonstrated to Council's satisfaction that subdivision of the land is necessary to enable the land-owning Trust to provide housing for the Maori owners and funds to further the aspirations of its people.

(c) The immediate margins of the Ohiwa Harbour are being protected from subdivision and development by the extensive pattern of reservation already voluntarily undertaken and or proposed by the Trust, the land on which the development is proposed has already been subject to modification and the subdivision is making use of land which is already zoned for residential purposes as an "infill" development rather than being



something which is proposed in respect of land which is still in its "natural" state.

(d) The conditions imposed will ensure as far as practicable that the development will be environmentally secure.

(e) The Trust has a right to use its land for housing with the reasonable expectation that it will be treated fairly and reasonably for the good will which it has shown through its earlier exchange of land for the public benefit.

2. The Council is satisfied that the conditions imposed in respect of the proposal will ensure that any development is appropriately protected from inundation and that any likely rise in sea level will have no significant effect upon the continued use of the land for residential purposes.

3. The Council considers that the setting aside of the reserve areas will provide a buffer which will adequately protect the development from storm-driven tides or such other similar threats.

4. The Council is satisfied that there are large areas of "inland" coastal swamp on the adjacent reserve which are protected by the "estuarine protection zone" and that in the circumstances, it is not reasonable nor practical to expect the applicant to set aside large areas of its land for the same purpose.

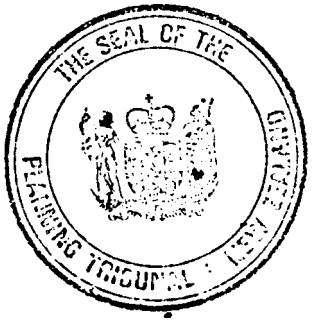
5. The Council considers that it is possible for the applicant to undertake a subdivision which, using controlled recontouring and filling to produce a natural appearance of the land, will ensure its protection from inundation and ensure that the residential use of the sections created will have no detrimental effect on the Ohiwa Harbour or those areas which have been identified as worthy of protection and which are contained within the 'estuarine protection zone'."

From the first clause of the above resolution it may be seen that, at an earlier stage, the trust's subdivision proposal was refused. By resolution made on 16 September 1991, the council's Environmental Planning and Control Committee resolved:

"THAT pursuant to section 279(1)(c) of the Local Government Act 1974, the Council requires the submission of a new Scheme Plan in respect of the proposed subdivision of Part Allotments 582 and 252 Waimana Parish Block 7311 WPB Whakatane Survey District to meet the following requirements:

(a) The deletion from the proposed Scheme Plan of subdivision of all land below 2.0 metres above Moturiki Datum.

(b) Addressing the issues set out in section 3(1)(c) Town and Country Planning Act 1977."



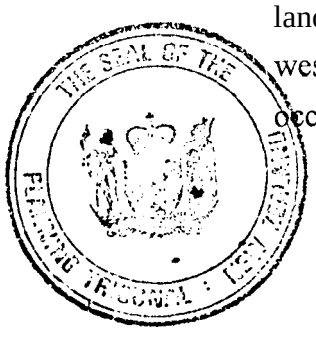
An objection was forthwith lodged by the trust against this decision under section 299 of the Act. The grounds for the objection were:

> "(i) By refusing to approve the submitted scheme plan and requiring a fresh scheme plan to be submitted, the Council has refused its consent to the subdivision.
>
> (ii) The submitted scheme plan complies in all respects with the Council's operative district scheme, as outlined and confirmed by officers' reports to Council.
>
> (iii) Submissions relating to all relevant aspects of section 3 of the Town and Country Planning Act 1977 have been supplied to Council justifying approval.
>
> (iv) The refusal to approve the submitted scheme plan, and inter alia to accept the submissions made to Council relating thereto is unfair and unreasonable and contrary to fact."

The committee, after receiving various reports from its staff and after considering submissions and evidence presented to it, decided to allow the objection and thus approved the subdivision in the terms already quoted.

To approach this case satisfactorily, it is necessary to undertake an outline of historical events, from which the present proposal may be seen as a culminating step. In November 1975, planning and engineering advice was sought as to the feasibility of subdividing 14.75 ha of land owned by the trust towards the eastern end of Ohope Spit ("the spit"). The land had recently been exchanged between the Crown and the trust - the trust having rendered up other land further eastwards, now represented within a large area of public reserve totalling 205.11 ha, lying both to the north of the applicant's land (on the other side of Harbour Road), and broadly eastwards to the end of the spit.

The spit, it should be noted, runs eastwards from Ohope township. It comprises a 6 km to 7 km territorial "finger" which serves to shelter Ohiwa Harbour from the open sea. In the vicinity of the trust's land the spit is some 700m to 800m wide. About 69 ha of the reserve area to the east is set aside for recreation purposes, with facilities including vehicle parking and boat access to the harbour. On further land there is a golf course with an associated clubhouse. The balance of the spit westwards of the trust's land, is well advanced in development, being substantially occupied by residential uses.



We accept the evidence of the trust's Chairman, Mr J Hunia, that in acquiring the subject land, (together with other land adjacent later referred to as the stage I and II areas), the trust responded to the Crown-initiated offer to exchange the subject land for the other land to the east, on the understanding that the land offered was zoned for residential use and was therefore available as a development prospect for housing. However, whatever the trust may have believed on the basis of assurances given at the time, (and we observe that there was no evidence placed before us from a source indicating the Crown's point of view), it must always have been appreciated that subdivisional approval would have to be obtained in accordance with relevant statutory provisions and district scheme requirements.

We return to the narrative concerning the trust's ownership of, and aspirations for, the land. At the time of acquisition by the trust, a "Comprehensive Residential Development" zoning applied, having been introduced some four years earlier in 1971. An initial feasibility report by the trust's consultant advisers spoke of the possibility of providing a total of 130 fully serviced residential sites, together with the setting aside of significant reserve land fronting the Ohiwa Harbour and a possible camping ground. Following receipt of the-report, the trust resolved at its first formal meeting on 11 February 1976 (quoting from Mr Martin's evidence) to:

> "Proceed with an overall concept plan and undertake a first stage of subdivision.
>
> To apply to the Maori Land Court to set aside Maori reserves, over and above the statutory requirements, as a matter of both public and private interest."

It will be convenient to quote further from Mr Martin's evidence as to subsequent steps taken by the trust through to the early 1980s (paragraph numbers omitted, and subject to minor grammatical alterations):

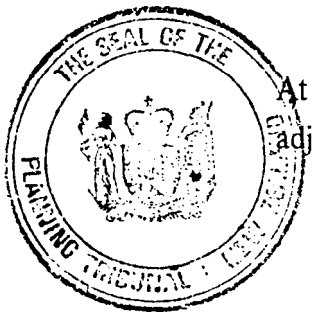
> "Negotiations as to subdivisional standards and Council expectations were then commenced with officers of the Whakatane District Council which extended through to September 1976, when an application to subdivide part of the land was made.
>
> It was not until November 1977, however, that an adequate response was received from the Council to enable the matter to be progressed.
>
> A combined application was then made with the adjoining neighbours, Waiotahi Contractors Ltd and Mr and Mrs R J Claydon, for a conditional use consent to establish the overall pattern of subdivision for the whole of the Comprehensive Development zone, in accordance with the ordinances and subdivisional standards which pertained at that time.

> Again, further protracted dealings took place with the Council, and ultimately a revised overall concept plan was agreed on, and methods of servicing the developments devised, to enable the first stages of subdivision to be undertaken.
>
> Of particular note during these negotiations was the requirement of the District Council Planner to set aside all of the dune tops adjacent to Harbour Road as reserves, and of the belated attempt by the Council at virtually the last minute before consent was granted, to delete these reserves from the agreed concept plan - the basis for the attempt being that the reserves would present a fire hazard and would be of no great benefit to Council.
>
> Consent to this overall concept plan was finally granted on the 22nd April 1981 and the first stage of subdivision of some 20 sites proceeded over the next year or so, eventually concluding in late 1982."

We note that Mr Martin, in the evidence just quoted, includes various comments indicative of his own opinion. While citing his evidence as a summary of the events, we refrain from necessarily adopting those words or phrases which seek to suggest how or why some of the events occurred.

It will be helpful to draw further from Mr Martin's evidence as to the course of events through to the council's decision resulting in the present appeals. By August 1988, the trust had sold all the sites in the first stage and resolved to proceed with a second phase of subdivision. Discussions were held between the trust's advisers and officers of both the district and regional councils. The trust was given to understand that the setting aside of dune top reserves was no longer to be sought as a matter of planning policy. The trust also understood (to quote Mr Martin) that:

> "The major roading pattern for development could remain as per the original concept plan, including the requirement for a low level connection to the Waiotahi contractor's land adjoining to the west.
>
> The earlier envisaged cluster type of development was no longer favoured by the Council because of the perceived difficulty to them of reserve management, and in any event (it was) precluded by changed subdivisional standards.
>
> The concept design would require amendment to comply with the standards for serviced subdivision that had been developed in the intervening period and incorporated in the District Scheme."



At the same time, the trust resolved, of its own volition, to set aside 2.40 ha adjacent to the Harbour as Maori reserve land - an action which was completed on

1 May 1989. In addition, a further 1.28 ha was set aside for recreation/conservation reserve purposes in the second stage of development.

For present purposes, the total area of reserves on the trust's various stages of development, (including the third stage now at issue on appeal), comprises 5.0508 ha or 34 % of the trust's original land area of 14.75 ha. The reserves are shown on plan 14745/12 (attached to our decision), which also depicts the intended lots and roading layout of all three stages. Attached, as well, is plan 62642/12/9 (sheet 1), depicting the lots in stage III. The reserves shown on plan 14745/12 include all of the estuarine salt marsh area located between the Ohiwa Harbour and areas to be developed (whether approved or proposed), plus what was described by Mr Martin as "at least a further 10 metres of buffer between the landward edge of the marsh and the backs of the proposed sections", fixed in consultation with officers of the district council and the Department of Conservation. Within the part of stage III intended for development, there is a low-lying freshwater wetland area, more or less at the head of Motutere Place (see second map), to which reference is later made.

A proposed subdivisional scheme for stage II was lodged with the district council for consent on 15 September 1989. The trust was, in turn, advised by the council that a further concept plan needed to be supplied and publicly notified. Despite reservations by the trust's advisers, the council's wish was respected. Eventually a hearing took place on 15 February 1990, when a number of submissions were received from sources such as the Department of Conservation, the regional council and various individuals, including several of the present lay appellants. Council officer reports and those of certain outside experts were also available. In the upshot, the council, by resolution dated 26 February 1990, specified eight suggested conditions under which a scheme plan would be considered. On 2 March 1990, the trust submitted an amended scheme plan for the second stage, incorporating the eight points. This was approved on 6 June 1990, subject to conditions including (inter alia):

> "2. That the minimum finished ground level on any residential section or active recreation area be 2.57 metres Moturiki Datum and each section have a building platform to a minimum of 2.80 metres Moturiki Datum."

The council's decision was objected to by the trust in respect of various conditions, but not including condition 2. After a further hearing in September 1990, the council partly upheld the trust's objection and issued an amended set of conditions.

In the interim, on 4 July 1990, an appeal was lodged by Mr B C Marshall (an appellant in the present proceedings), along with the Maruia Society Inc. This appeal, however, did not proceed and was ultimately withdrawn late in November 1990. The subdivisional development was thus able to proceed. Engineering plans were drawn up and approved by the council in December 1991. Construction works for part of the second stage (stage IIA) were undertaken and completed during the 1991/1992 summer period. Separate titles have now been issued for the lots concerned and three sites have thus far been sold. Subdivisional construction work on the remainder of stage II (stage IIB) is expected to be completed in the 1993/1994 construction season.

For completeness, it should be recorded that all construction work on stage I was completed and all lots sold by August 1988. As to the number of lots in each stage, stage I comprised 20 lots and stage II 32 lots. Therefore, between the two stages, 52 lots have been, or are being, laid out and supplied with the usual services for sale as residential sections. Stage III is intended effectively to "round off' the total subdivisional concept, by providing a further 65 lots - this stage being the largest as to the number of intended lots. A fourth stage of some 4 lots is also intended. As it is dependent on the outcome of stage III and was not focussed upon during the hearing, we need not refer to it further.

The zoning applicable to the land under the district plan is Residential A. It was introduced in March 1983 under a scheme review then proposed pursuant to the Town and Country Planning Act 1977 ("the Planning Act"). Previously, as already noted, the land was zoned "Comprehensive Residential Development", under which a conditional use application was necessary before residential development could proceed. In 1977/78, such an application was approved for a "cluster housing" proposal under the zoning. The trust appealed against certain conditions and the appeal was resolved by a consent order. However, the cluster concept was not proceeded with. Rather, the trust followed the changing thinking of the district council, which led to the Residential A zoning under which stages I and II have progressed. Hence, although the trust undoubtedly expected that, in agreeing to the exchange arrangement with the Crown, it would be able to subdivide the land for residential purposes in order to market it profitably, plainly there was not an absolute right in this regard in that conditional use consent was required under the Comprehensive Residential Development zoning. Moreover, with the land being within the coastal environment (not a matter of dispute before us), due consideration had to be afforded at all material times either to s 2B(a) of the Town

and Country Planning Act 1953 (s 2B having been inserted by s 2 of the Town and Country Planning Amendment Act 1973), or to s 3(1)(c) of the Planning Act. However, in zoning the land Residential A in the 1983 review, one would expect the then council to have considered the suitability of such zoning against the background of s 3(1)(c).

2. The Land and the Proposal

The stage I area is largely, if not completely, developed as and for an "orthodox residential subdivision" (to use Mr Martin's description). Stage II is well advanced, most of the land having been cleared, recontoured, laid out and supplied with necessary services. The roading in both stages is to the normal standard stipulated under the district scheme for a residential subdivision. The stage III proposal is likewise conventional, both in lot density and layout. Mr Martin candidly acknowledged this as being the case. However, he considered that, with the considerable area voluntarily yielded up for reserve purposes, and against the background of stages I and II having been consented to in the manner they have been, there is no adequate reason to deny the applicant approval as sought.

The stage III area is generally covered with characteristic sand dune vegetation consisting mainly of fern and scrub. More specifically, the vegetation comprises a low cover of mixed indigenous and adventive introduced species, its generally low height reflecting and emphasising the general contour of the underlying land form. But the topography of the area is by no means pristine. Indeed, much concern was expressed during the hearing about earthworks undertaken by the trust's engineering advisers, in the course of which a particularly low-lying area, more or less at the eastern end of Manuera Place, was filled in. It is relevant here to mention that the stage IIA earthworks were substantial, considering that development of 17 lots only was involved. According to the applicant's engineering witness, Mr A M Morton, 21,000m^3 of cut to fill earthworks were undertaken using in situ sand material, including 2,600m^2 of roading. Part of the stormwater reticulation works involved formation of a stormwater settlement basin within the reserve areas shown on plan 14745/12/9 off Rangitukehu Street. The basin is designed to act as a soakage area for discharge of stormwater from the stage II area, with provision for overflow in a major storm event. This form of stormwater disposal was strongly criticised by some appellants, seeing that the proposed stage III development would repeat it for a significantly greater number of lots.

Just before Christmas 1991, as a result of a complaint from one or more local residents, the applicant's consultants were told to cease interfering with the stage III area for the purposes of stage II. In explanation, Mr Martin testified that his firm believed that the trust was authorised to undertake earthworks affecting stage III by virtue of the engineering plans approved for stage II. Once it was pointed out by the district council's Chief Planner, Ms D Turner, (by letter dated 9 January 1992) that the applicant in fact lacked approval to undertake any works on stage III, consent was sought as a matter of urgency to complete filling of the depression within the stage III area. Such consent was granted by Ms Turner, acting under delegated authority, by letter to Mr Martin dated 14 January 1992. The area was to be filled to an envisaged finished level of 4m RL, with the filled area to be topsoiled and replanted in vegetation naturally occurring within the vicinity

The work was duly completed to the Chief Planner's satisfaction, so that, as of today, the filled area is not at all obvious, whether in terms of recontouring or revegetation, in relation to the land surrounding.

Mr Morton went on in his evidence-in-chief to describe the engineering works intended for stage III (paragraph numbers omitted):

> "It is proposed that Te Taiawatea Drive and Motutere Place be formed with three low points at 2.5m Moturiki Datum and maximum levels at around 2.8m Moturiki Datum. The surrounding sections will be formed with building platforms, graded towards each road and/or the harbour, with a minimum level of 2.8m Moturiki Datum (as required by Council) but higher for many lots; the final heights dependent upon the amount of fill material available.
>
> The road low points will be at the end of each road and the intersection. Stormwater will be piped from each to three separate settling/soakage basins sited within the Trust's block, on each of the Maori Reservations. The surrounding land will be contoured to ensure that overflow does not discharge direct to the harbour or onto adjacent reserve land, (to the east). Plan 62642/12/9 Sheet 1 shows the road grades and sites for the stormwater settling/soakage basins. The stormwater flow rate into each of these basins will be less than 80 litres/sec, the limit for a discharge under the Bay of Plenty Regional Council General Authorisation.
>
> Manuera Place will be at around 4.0m Moturiki Datum and drainage from that area will discharge to the system already constructed for Stage II. Stormwater pipes were laid, in conjunction with the Stage II works, to serve this area, and presently stop at the west boundary of the proposed Lot 22.

Some of the dune material between Manuera and Motutere Places will be required for filling low areas (generally the east end of Motutere Place) to reach the required minimum road and building platform datums. It is proposed to reduce the dune height to around 6.0m Moturiki Datum. As well as providing needed fill, lowering the dune tops also forms more stable slopes and hence building platforms for Lots 14-19 and 33, 36, 37 and 38.

Plan 62642/12/9 Sheet 2 shows a cross-section from Ohiwa Harbour across to the main dunes north of the Trust's land. The removal of 2-3m from the crown of the dune, as shown, also reduces the height of any residential development. The end effect is to keep the roof line of dwellings built on that dune area below the skyline level of the higher adjacent northern dunes, which are part of reserve land, when those dwellings are viewed from the harbour.

The main area of filling for sections is on Lots 43-50. It is proposed to form a rock filled gabion retainer adjacent to the east boundary of Lots 44 and 45 (as shown on plan 62642/12/9 Sheet 1). This will be around 70m long and will have a top level of around 2.2m Moturiki Datum. The maximum height of the gabion retainer will be 1m (i.e., one layer of 1m x 1m gabions will be used). Lesser height lengths will require only 0.5m high gabions. The additional 0.6m of fill, required to give a minimum building platform level of 2.8m Moturiki Datum, will be graded and topsoiled ground, stabilised with grass, trees and shrubs. The ground between the top of the gabions and the edge of the 400m^2 building platform will be graded at 1:15 or better. Ground at this slope, covered with vegetation, will remain stable during inundation, if it occurs.

Of the sections closest to the harbour shoreline, only Lot 98 will require filling (less than 0.5m depth) to provide a building platform of 400m^2 or more at 2.8m Moturiki Datum or higher. Lot 103, the closest to the harbour, is 50m from the shoreline at its southern corner.

The marsh and higher ground between these sections and the shoreline is covered in dense vegetation which affords protection against erosion of the underlying soils. The subdivision is similarly protected along the lower eastern side (the estuarine swamp area) and with the gabion protection works in Lots 44 and 45, the major fill area will be protected from erosion. The well established vegetation and higher land will form a physical barrier to reduce effects of wave surge and inundation on the residential sections.

The proposed minimum building platform level of 2.8m Moturiki Datum with due allowance for section grading to allow surface run off, in effect means that the minimum floor level for any dwelling will be 2.9m Moturiki Datum, ie, in the case of a dwelling with a concrete floor. For dwellings on piles the minimum floor level will be around 3.35m Moturiki Datum.

It should also be noted that once residential development is completed, and landscaping and fencing established, then effects of wave action, in the unlikely event that inundation of the residential areas below 2.8m Moturiki Datum does occur, are diminished by fences and other barriers."

From the foregoing description, it will be appreciated that the earthworks intended for stage III are significant. Considerable argument focused during the hearing upon the proposal to lower the "dune top" area, immediately south of the eastern end of Manuera Place, from its current maximum height of some 9m Moturiki Datum down to 6m. A second major area of contention was the proposed filling of Lots 43 to 50, with provision for high rock-filled gabion retaining structures (as described above by Mr Morton) along the eastern boundaries of Lots 44 and 45 - that is to say, the filling of that part of the fresh water wetland area earlier mentioned (comprising about 2000m^2) located within the trust's land. The remaining part (comprising about 3000m^2) lies within the public open space reserve land to the east. The combined wetland area was said to be of special significance to wildlife; and the gabion retainers were said to be unwarranted man-made structures, introduced simply to enable fill to be retained on the trust's side of the boundary, while producing an artificially "walled" effect when viewed from the adjacent recreation reserve. In response, it was claimed that the wetland within the trust's land does not have the significance claimed by others, either looked at alone or in relation to the whole of the wetland.

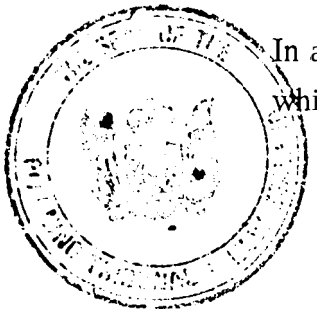
Having inspected the area for ourselves, we agree with Mr Martin that the wetland is not of particular significance as it stands. We found it infested in places with gorse and generally in a state at variance with what might have been expected. Were the wetland overall significantly greater in area, then incipient infestation of gorse, and other evidence of deterioration such as indications of people having traversed through, would not have sufficed to deter us in making suitable provision for its preservation - with an appropriately generous buffer being very likely required as a condition of any subdivision of the land surrounding. But such is not the case. On balance, having weighed the evidence on this aspect in the light of our own site inspection, we consider that it is reasonable to proceed in filling the area. We also accept the evidence for the trust that the gabion retainers would be able to be covered and planted with vegetation so that their finished effect would not be obtrusive. Yet, although we hold in the trust's favour upon these aspects, other concerns of a more fundamental nature are inherent in the proposal - rendering it necessary, as will later be seen, to deliver this decision on an interim footing only.

3. Evidence as to Storm Events and Sea Level Rise

This head deals with a central part of the case. In fact, the issue of potential inundation by the sea primarily led the regional council to appeal. It will be recalled that stage II was approved by the district council in June 1990, after calling for a concept plan from the applicant showing the manner in which the balance of the applicant's land was proposed to be developed. The regional council made submissions on that plan, claiming that all land below 3m Moturiki Datum would be subject to inundation and that the applicant had failed to take this into account. Even so, the district council approved stage II and imposed conditions requiring a finished ground level on each residential site of not less than 2.57m RL with a building platform level of 2.8m RL. Because most of the land in stage II was above the 2.45m contour, the regional council decided not to appeal on that occasion. (For the sake of clarity, we pause here to note that all levels hereafter mentioned are reduced levels calculated by reference to the Moturiki Datum.)

When subdivisional consent was sought for stage III in April 1991, the regional council presented a detailed submission, seeking, as it had done for stage II, a building platform level of 2.95m, plus an allowance for future sea level rise. The regional council sought that the minimum natural ground level of the land to be subdivided be 2.45m. In addition, the Department of Conservation, in a separate submission, sought a minimum natural ground level of 3m.

The trust's application for approval of stage III was, in effect, declined by the district council, in that a new plan of subdivision was sought, with all land below 2m being excluded and with appropriate protection of the coastal environment being provided for in accordance with s 3(1)(c) of the Planning Act. This decision was objected to, the objection being upheld on 24 July 1992. The present appeals have resulted. The decision was contrary to the recommendation of the council's acting chief planner, Ms T Izzard, contained in a report dated 30 June 1992. Ms Izzard was called before us to produce and confirm her report, which she did. We have considered her views, along with those of the other planning witnesses. We discuss them under heading four.

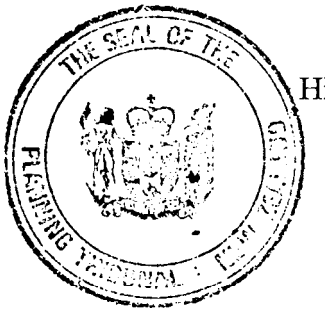


In allowing the trust's objection, the district council approved the scheme plan for which approval was sought, subject to the condition (inter alia) that the minimum

finished ground level within the subdivision be 2.8m. By its appeal, the regional council seeks exclusion of all land below the 2.45m contour; and for land above that level a minimum finished ground level of 2.95m is sought, with a building platform ground level of 3.5m. The regional council is prepared to accept in-filling of land above the 2.45m contour. It is said that exclusion of land below that level could be achieved in two ways - either by total exclusion from the subdivision, or by restrictive covenants on titles.

Evidence by expert witnesses on the sea level issue and related matters, called for the regional council on the one hand and for the district council on the other, was both complicated and conflicting. Before seeking to analyse it, it will be as well to mention *Maruia Society Inc v Whakatane District Council* 15 NZTPA 65, a decision of Doogue J in the High Court which arose from a case involving rather similar issues. There, the district council, in October 1987, approved a residential scheme plan of subdivision for land adjacent to the Ohiwa Harbour, some two to three kilometres westwards of the trust's land. The council fixed the minimum ground level for the subdivision at 2.18m and a minimum floor level of 2.5m. Before approving the scheme plan, the council had earlier received advice from the Bay of Plenty Catchment Commission (of which the regional council is successor) that the storm level for the harbour was 2.45m. The appellant sought judicial review on a number of grounds, including the district council's failure to take into account rising sea levels. Section 274(1)(f) of the Local Government Act 1974 was relied on, with the words "subject to ... inundation" being pointed to as indicating that the council should have taken into account its knowledge of what was likely to occur to the land in the future, based upon the best evidence available to it. Section 274(1)(f) reads:

> "(f) Without limiting the generality of paragraph (a) of this subsection, -
>
> (i) The land or any part of the land in the subdivision is subject to erosion or subsidence or slippage or inundation by the sea or by a river, stream, or lake or by any other source; or
>
> (ii) The subdividing of the land is likely to accelerate, worsen, or result in erosion or subsidence or slippage or inundation by the sea or by a river, stream, or lake, or by any other source, of land not forming part of the subdivision:
>
> Provided that this paragraph shall not apply if provision to the satisfaction of the council has been made or is to be made for the protection of the land (whether part of the subdivision or not) from erosion or subsidence or slippage or inundation; or ..."



His Honour went on to state (p.72):

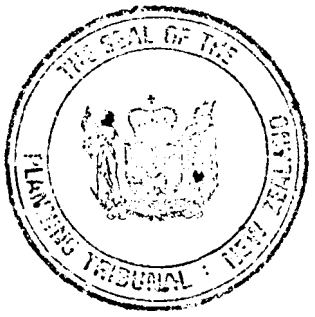
> "Having regard to its opening words it is difficult to see how s.274(1)(f) could prevent an authority such as the council from taking into account not only what has occurred in the past, but what is on the best evidence available to the council likely to occur within the foreseeable future."

Significantly, it was pointed out that this did not mean that a consent authority would be expected to resolve what were termed "conjectural matters". As the learned Judge put it (ibid):

> "That is not to say that an authority would have to go to any particular lengths to determine what are clearly difficult areas in respect of likely future changes in sea or ground level. Whether the evidence at present available in respect of matters such as the "greenhouse" effect is anything more than conjectural I do not know. I neither accept nor reject the evidence that was placed before me in respect of such matters as it does not fall within my province. It would be a matter entirely for the council or the Planning Tribunal as to the extent to which it took such information into account.
>
> A related issue is whether the proviso to s.274(1)(f) enables the council to take into account its present knowledge of what is likely to occur in the future based not only on past inundation but on the best evidence of future probabilities. The proviso lends itself to the interpretation that it encompasses all likely future inundation. There is nothing in its language that requires the council to limit itself to historical events. Whilst the proviso is to meet the consequences of the application of the subsection, its very language speaks against a limited meaning being intended for the subsection.
>
> On the face of it there is nothing in the subsection, or in the proviso, which justified the advice given by the development engineer to the council that they could not take into account likely future events, to put his advice into simple and general terms.
>
> As a result of the development engineer's advice the council failed to take into account what information was available as to likely increases in sea level in the immediate and foreseeable future. There is nothing in s.274(1) preventing that information being taken into account."

And later he said (p.73):

> "Section 274(1)(a) is directed to whether land is suitable for subdivision or not. If it is not suitable the council is to refuse to approve the scheme plan. Without limiting that general proposition, under s.274(1)(f) the council is to refuse the scheme plan if the land or any part of that is subject to inundation unless provision is made to the satisfaction of the council for the protection of the land from inundation. The council is given a discretion to determine whether sufficient provision is made for protection. If it is, s.274(1)(f) does not apply. The council's emphasis must always be on whether the land is suitable for subdivision. That must always be a matter of degree. One would expect the application of the discretion granted in



> the proviso to be equally a matter of degree. The proviso does not require total or absolute protection. It requires sufficient protection to make the land suitable for subdivision."

And later again (p.74):

> "It is common knowledge that in many areas of the country there are parts of the ground incapable of residential development, whether for reasons within s.274(1)(f) or not, upon which building could not be safely or properly carried out. It does not follow that because land is zoned residential that the uses provided for within that zone can be carried out on every part of every allotment within the zone.
>
> It is axiomatic that not every part of every piece of land is or can be made suitable for subdivision. It does not follow the land is not suitable for subdivision because part is not suitable. Neither s.274(1)(f) nor its proviso requires that conclusion.
>
> The legislature has given the council a discretion to determine whether sufficient protection is made against inundation. The degree of protection is for the council. It does not have to ensure the whole of the land is free from the risk of inundation. It does have to ensure that in its judgment the land is sufficiently protected to be suitable for subdivision.
>
> Given a fair, large or liberal interpretation rather than a narrow grammatical interpretation, it is clear the legislature did not mean or intend that the council had to protect every part of the land in the subdivision from inundation."

Doogue J went on to mention s 274(1)(d) ("The proposed subdivision would adversely affect the implementation of any of the matters specified in section 3 of the Town and Country Planning Act 1977") - because it was argued that no consideration had been given by the council to s 3(1)(c) of the Planning Act in respect of the subdivider's application for subdivision. After citing the well-known twin authorities of the Court of Appeal in *Environmental Defence Society Inc v Manganui County Council* 13 NZTPA 197 and *Opoutere Residents & Ratepayers Association v The Planning Tribunal* 13 NZTPA 446, His Honour stated (p.77):

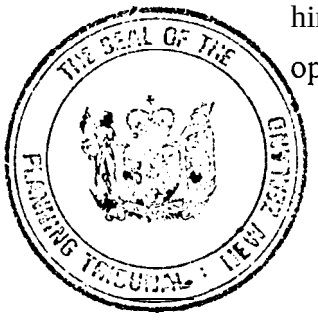
> "I do not think it appropriate that I endeavour to add to what has been said by the Court of Appeal in respect of s.3(1)(c) of the Planning Act. I do not accept the submission of Mr Green that the council should take a lesser view of the section because the surrounding area in his submission is already compromised. He submitted that because of that the council could adopt a lesser standard than if it was a 'green field' situation. That is a non sequitur.
>
> The obligation on the council is to apply the provisions of s.274(1)(d) of the Act and s.3(1)(c) of the Planning Act to each individual case before it. It is for the council to decide whether the subdivision or

> development is necessary or unnecessary in the light of the information before it.
>
> On this issue, as on the issue of the extent of the protection to be given to the land in respect of inundation by the sea, the council, and, in the event of any appeal, the Planning Tribunal, are the appropriate bodies to determine the standards to be adopted so long as appropriate effect is given to the law. It is not for this Court on review proceedings to indicate to the council what view should be taken of those matters."

We have quoted extensively from Doogue J's judgment in view of its relevance and importance for present purposes. We will later refer to the two Court of Appeal cases bearing on s 3(1)(c), when coming to our evaluation and conclusion under heading seven.

We now turn to the evidence of Associate Professor R M Kirk, Head of the Department of Geography, University of Canterbury, and a specialist in physical coastal processes and coastal management; also that of Professor T R Healy, Research Professor of Coastal Environmental Science at the University of Waikato, a specialist likewise in coastal processes and management. Another respected authority in the field to give evidence was Dr J G Gibb, employed by the Head Office of the Department of Conservation, Wellington, as Senior Adviser on coastal management issues. Finally, we were assisted by evidence from Mr D G Pemberton, employed as Director of Operations and Rural Services by the regional council.

In 1991, Professor Kirk was retained to advise the district council on various sea level rise and coastal management issues in the wake of the proceedings before Doogue J. On 14 August 1991, a meeting was held at the district council's offices in order to consider, first, the question of sea level rise; secondly, other aspects of water levels on Ohiwa Harbour; and thirdly, other coastal processes such as tsunami and wind wave action - so as to arrive at ground heights. and building platform levels for the subdivision at issue in the High Court (known as "the Munro subdivision"). Professor Kirk subsequently reported to the council on the outcome of the meeting and made recommendations on ground heights and building platform levels for the Munro subdivision. His report reflected what he took to be "a reasonable degree of consensus" reached at the meeting. In hindsight, it appears that Professor Kirk's belief that a consensus was reached was optimistic in that Dr Gibb, in his evidence, eschewed any such suggestion.



In January 1992, officers of the regional council promoted a policy statement on extreme sea levels which contained views rather different from those which Professor Kirk thought had emerged at the previous August meeting. The policy statement has since been adopted by the regional council as an interim measure, although it does not have any binding force because it has not yet become the subject of any regional plan provision or other formal regulatory control under the 1991 Act. At most, it is a set of guidelines which the regional council considers helpful in considering cases such as the present.

After determining what action to take over the Munro subdivision in the light of Professor Kirk's advice, the district council approved the trust's stage III proposal by applying (to use Professor Kirk's words) "the coastal process and ground height considerations reached by me for the Munro site to the Waimana site". Professor Kirk considered this approach to be appropriate. As he put it:

> "It is my contention that the proximity of the sites and the similarity of the exposure to coastal processes is sufficiently similar that this was a satisfactory and prudent procedure to adopt."

Professor Kirk went on to discuss what he saw as the "relationships between the Waimana and Munro sites". He stated:

> "Both sites occur on the inner harbour shore of Ohope Spit with the Munro site being some 2.05 km further west than the Waimana site. The sites present some differences in their physical histories and their land forms but they both border the same system of estuary channels and are subject to much the same exposures to modern land forming processes. Pre-development ground heights at the Munro site ranged between 1 and 4m above Moturiki Datum with appreciable parts of the area around 2m. Exposure to potential coastal hazards was, in my view, a somewhat more critical consideration for the Munro site than it is for the Waimana site because of the different patterns of ground elevation. In my view, entirely adequate provision for rising sea-level and for extreme events was made for the Munro site. A generous margin was also provided against uncertainties in the values chosen for water levels.
>
> The two sites are in close proximity. Both face generally southward and were upwind, and therefore among the most sheltered shores of Ohiwa Harbour in the 'Wahine Storm' of April 10, 1968. There is general agreement that this event was the largest known and it has been employed as a 'worst case' scenario. The two sites have a similar exposure to tsunami and are also similarly affected by wind wave action in non-storm conditions. For the reasons just given I consider it sensible and prudent to treat coastal hazards at the Waimana site using the approach and values developed for the Munro site, as WDC has done.

> Port Ohope, from which the water levels under extreme conditions are most reliably known, occurs between the two sites and is thus close to both. Furthermore, I consider it both wrong and unnecessary to treat the Waimana site using values derived from remote sites elsewhere in the harbour, and which have a very different exposure to extreme events (ie Cheddar Valley), as BOPRC have done at and since the WDC meeting."

Professor Kirk next discussed the water levels he had recommended to the district council for adoption in the case of the Munro subdivision. He listed the factors included in the estimates of ground heights and floor heights as mean sea level, mean high water mark, mean sea level rise, extreme events (storm surge and tsunami), and what he termed "a factor of safety" (otherwise termed "freeboard"). The magnitudes assigned to these various components were as follows (by reference to the Moturiki Datum):

Mean Sea Level - 0.0	Mean High Water Mark - 0.8m
Mean Sea Level Rise - 0.3m (2050 AD)	Extreme Events - 1.4m (over and above sea level rise and tide factors).
Freeboard 0.3m -	

Professor Kirk assessed the position as at 2050 AD by adding the 0.3m mean sea level rise figure to the 0.8m mean high water mark figure and to the 1.4m extreme events figure, thus producing a total estimate of 2.5m. Allowing also for the freeboard figure of 0.3m, he arrived finally at a recommended ground height of 2.8m - that being the figure adopted by the council for the Munro subdivision and also in the decision now under appeal. (Roading for the Munro subdivision, it may be observed, was determined at or above 2.5m; and the following values were employed for building platform heights: concrete slab floor - 2.9m; wooden floor - 3.4m - allowing for a 0.1m and 0.6m margin respectively.)

Later in his evidence, Professor Kirk referred to sea level rise predictions published by an internationally-recognised forum called the Inter-governmental Panel on Climate Change (IPCC); and in this country, the New Zealand Climate Change Programme (Ministry for the Environment). We were told that the IPCC estimates are expected to be reviewed in the next year or two. Be this as it may, Professor Kirk asserted that the climate models used to make predictions in country-wide, let alone global, terms are "crude in respect of ocean/atmosphere interactions and spacial resolution, especially in the southern hemisphere". In short, he considered

that reliance placed on IPCC global estimates by other witnesses was misconceived.

We hope it will not be thought discourteous if we refrain from repeating Professor Kirk's detailed statements in support of the levels recommended by him to the district council and adopted for the purposes of its decision. Suffice it to say, we have carefully weighed all he had to say alongside the views of other witnesses shortly to be mentioned.

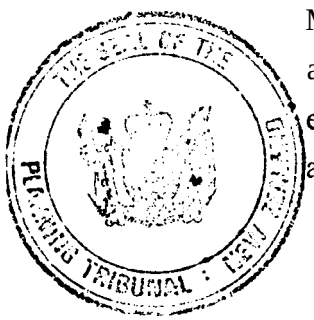
Reliance was placed by Professor Kirk and others on the work of Dr J Hannah, a contributor of various important articles, including one entitled "Analysis of Mean Sea Level Data from New Zealand for the Period 1899-1988" (Journal of Geophysical Research, Vol 95, No B8, Pages 12,399-12,405, August 10, 1990) which we have perused. We have also had the advantage of reading other published material furnished to us by mutual agreement.

Before passing from Professor Kirks evidence, it will be as well to quote this further passage setting forth his views in favour of a forecasting period to 2050 AD in preference to 2100 AD as suggested by other witnesses:

> "In the context of the Munro and Waimana subdivisions it will clearly be the case that mean sea-level will rise between 0.085 and 0.10m during the next century by simple continuation of the known historical trends. Adopting Hannah's (1989) extrapolations (which add ice-melt and thermal expansion terms to the existing rate of rise) mean sea-level at Ohiwa Harbour might rise by 0.3m to the year 2050 AD. The more recent IPCC estimates for global average sea-level suggest a 0.65m increase by the year 2100 AD, but there is presently no way to relate these estimates to any part of the New Zealand coast.
>
> It is therefore concluded that a sea-level rise of plus 0.3m by 2050 AD is appropriate for both the Munro and Waimana subdivision sites on Ohiwa Harbour. Adoption of this value is also useful in the sense that the similar IPCC value was incorporated into a rigorous and technically extensive review of extreme events on Ohiwa Harbour by Dr de Lange of Waikato University.
>
> Concerning time scales, two markedly different schools of thought exist on this matter. Dr Gibb with DOC and BOPRC argued at WDC that this matter should be approached from the standpoint of a notional 'lifetime' of a development and this should equal 100 years. This determination which might be given numerous definitions (eg economic 'lifetime' equal to 20 years; physical life of structures at 50 years, etc.) is, in the view of proponents, to drive the consideration of sea-level rise.

> In direct contrast, Dr de Lange and I argued that the proper choice of period for consideration of sea-level must stem from the technical credibility with which its behaviour can be forecast. Neither feels that reliable predictions can be made much past the year 2050 AD in the present state of technical knowledge. A 59 year forecast (ie from 1991) is very long in any field of endeavour, particularly in planning. It is suggested here that adoption of a 109 year 'life' for the development by projecting sea-level to the year 2100 AD implies a certainty about sea-level behaviour that frankly does not exist.
>
> This can be illustrated from the nature of sea-level rise estimates themselves. For example, the IPCC global average sea-level projections carry an uncertainty range of ± 50% regardless of time period and the curves of projected sea-levels diverge markedly into the future. It should be noted that these ranges do not carry calculated probabilities, they are merely crude ranges of uncertainty in estimates for the mean rise. Thus, at 2050 AD IPCC concludes global average sea-level might be between + 0.2 and + 0.4m above now. At 2100 AD it might be between + 0.31 and 1.10m higher. Assuming for the moment this applied to Ohiwa Harbour the physical effects of sea-levels in the 0.2m range of uncertainty at 2050 AD are much less variable than those in the 0.81m range of uncertainty at 2100 AD. In other words, our assessments of hazards and physical impacts would be very different if sea-level was accepted to be + 0.31m higher than if we accepted it would be + 1.0m higher.
>
> For these reasons I advocated that the time horizon for the sea-level rise consideration should be 2050 AD."

The next witness to mention is Professor Healy. He described himself as "reasonably familiar with the site under consideration from periodic field inspections over the years from 1976", his most recent inspection being in November 1992 in the company of Mr Pemberton and Mr Mandemaker from the regional council. Against the background of evidence given by Dr Gibb and Mr Pemberton regarding the level attained during the 1968 "Wahine" storm, Professor Healy considered that a 0.5m freeboard margin should be allowed over and above the level attained in the 1 in 100 year event represented by the storm mentioned. Indeed, he believed that "such a storm may happen more frequently than a 1 in 100 event, because under a scenario of climatic warming we are likely to experience a greater frequency of La Nino-type regional wind patterns and of extra-tropical cyclones with strong northerly winds and their attendant storm surges in the Bay of Plenty". Professor Healy went on to refer to the IPCC (1990) "best estimate" sea level rise of 66 cm by the year 2100. On the basis of that he considered "a building level restriction of about 3.5m RL for the Ohiwa Harbour situation is appropriate". Mention was also made of the "behavioural uncertainty" of the Antarctic ice sheet as a factor that could lead to accelerated sea level rise beyond existing "best estimates". However, Professor Healy was prepared to adopt a "business as usual" approach, employing the IPCC's current prediction through to the year 2100.



He then went on to address the question of coastal erosion in these words (paragraph numbers omitted):

> "Staff from the Bay of Plenty Regional Council undertook a photo analysis of the rate of shoreline retreat using the historical vertical airphotos since 1945. From this analysis it is evident that the shoreline along this sector is retreating on average up to 0.5m per year, which seems consistent with the evidence of root remains and the remnant wooden fence illustrated in Figure 2 (in my evidence). Notably the sandy dune shoreline is eroding at a greater rate than the more cohesive swampy-peat shoreline.
>
> There is no reason to believe that this average rate of retreat of up to 0.5m per year would reduce in the future, and indeed with expectation of sea level rise, the retreat rate would likely become accelerated as a result of the so-called 'Bruun Effect'. Clearly, well within the planning lifespan of 100 years the shoreline would be lapping onto the subdivision, or otherwise require coastal 'protection' works to be provided by the local authority.
>
> Construction of a sea wall to protect the development in case of such an eventuality is quite inappropriate. Sea walls typically exacerbate the erosion effect by inducing wave scour at the base of the wall, thereby facilitating its eventual collapse, consequently leading to demand from the people who in good faith purchased land in the subdivision, for further capital expenditure for coastal protection. It is much preferable, and a wiser use of coastal land resource, to recognise the hazard and establish a Coastal Hazard Zone in an attempt to avoid future problems arising from it."

Given these views, Professor Healy recommended that, in approving any subdivision, a "coastal hazard zone line" should be delineated so as to "include all of the land under 3.5m RL as well as all of the land within 50m of the existing shoreline". He presented a diagram with his evidence showing a suggested line as running more or less across the stage III area, a little below the 4m contour south of Manuera Place (see map 62642/12/9). If such a hazard line were adopted this would, in effect, exclude about two-thirds of the proposed stage III area from subdivision. However, the relief sought by the regional council in its appeal does not go as far as this. Rather, we were given to understand that the regional council was seeking to adopt a reasonable "middle ground" stance, having regard to the spectrum of opinion advanced by experts such as Professor Healy and Dr Gibb. We now come to the latter's evidence.

Dr Gibb informed us that his interests have been directed to Ohiwa Harbour from time to time over many years. As he put it:

> "I have periodically visited Ohiwa Harbour since 1962, and, in 1977 completed and published a study on the Late Quaternary sedimentary processes at Ohiwa Harbour, with special reference to property loss on Ohiwa Spit. Part of this study involved a detailed examination of the evolution of Ohope Spit during which past shorelines were defined using tephra (air-fall volcanic ash deposits), sea rafted pumices, old survey plans dating from 1867 and air photos dating from 1945. Since 1977, I have kept a watching brief on both Ohiwa and Ohope Spits and have made several inspections of the Waimana Subdivision site including the collection of new information in August 1993 for this hearing."

In common with Professor Healy, Dr Gibb regarded a forecasting period as far ahead as 2100 AD as appropriate. On the question of potential flooding from the sea from storm tides, he had this to say:

> "My findings reveal that the Waimana site has most probably experienced flood heights of the order of 2.4m above MSL during the Wahine storm and various tsunami during last century. In my opinion, there is a high probability that the Waimana site will experience flood heights from storm tides of approximately 3.0m by 2050 AD, 3.4m by 2100 AD and 3.7m by 2150 AD. Without a storm tide a tsunami of 1.5m would produce the same result in terms of a flood height at the particular periods of assessment."

These figures were advanced after arriving at "lesser height" and "greater height" estimations as explained in his evidence. The lesser height estimations were 2.7m for the year 2050, 3.1m for 2100 and 3.4m for 2150 - these being levels likely to produce potential effects of high probability and high potential impact via storm tide flooding. By contrast, the greater height estimations of 3.2m, 3.6m and 3.9m for the respective years, were said to have potential effects of low probability with similar high potential impacts (were the levels to be exceeded). On the question of coastal erosion, Dr Gibb was much less pessimistic than Professor Healy, in that, although the "historic rate of retreat from sea erosion at - 0.1m/year" was thought by him likely to increase from the cumulative effects of rising sea level, he nevertheless felt that "the very low rate is unlikely to affect residential development on the land proposed for development". Based on his intermediate figures, Dr Gibb concluded by suggesting the adoption of a platform level of 3.7m above mean sea level for the construction of all permanent buildings on sections approved for subdivision.

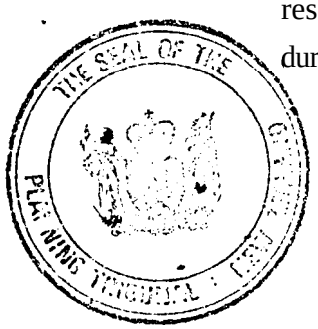
We were impressed with the thoroughness of Dr Gibb's presentation. As in the case of Professor Kirk, we trust we will not be thought discourteous if we refrain from attempting a survey of all he had to say.

Turning to Mr Pemberton, he set out for us the regional council's policy (earlier mentioned) adopted in February 1992 as follows:

> "That it be established as an interim Council policy pending the adoption of the Regional Policy Statement that for design and planning purposes in the coastal zone, a maximum 'solid' sea level be established as follows:
>
> > Existing conditions of tide, barometric set up, wind set up and factor of safety (applying to these components) total 2.05 metres above mean sea level (Moturiki Datum) to which is added for local effects:
> >
> > (i) In estuarine situations: a minimum of 0.30 metres
> > (ii) In open coast situations: each site to be evaluated for wave action and wave run up.
>
> That for rising sea level, Council adopts the 'best estimate' scenario of the IPCC Data.
> That important estuaries (for example Tauranga) be subject to specific analysis for extreme water levels."

By and large, Mr Pemberton's evidence echoed and reinforced that of Dr Gibb. Both witnesses regarded the IPCC "best estimate" data as important for reference purposes; and they disagreed with Professor Kirk that the information was too general to apply meaningfully at Ohiwa.

Having reflected upon the evidence of all four witnesses, including their answers under cross-examination, we are of the view that, in this case at least, a forecasting period to 2050 AD is reasonable. Given the present state of understanding of the factors causing global and regional sea level changes, we accept the 2050 AD time horizon for present purposes - that being, in our view, as far as the "foreseeable future" may reasonably be extended, allowing for the uncertainties of scientific knowledge and balancing the interests of the applicant and succeeding landowners. By adopting such a time frame in this instance, it should not be thought that in another planning context a different time frame ought not to apply. We simply say that, on the evidence before us and against the background of this particular case, such a forecasting period seems to us appropriate. We thus adopt Professor Kirk's evidence on this aspect. On the other hand, we are persuaded by Dr Gibb and others that the IPCC "best estimate" for general sea level rise of 0.3m as at 2050 AD should be taken heed of This is particularly so in the light of Dr Hannah's research work, in which an inexorable sea level rise progression in New Zealand during the 20th century has been demonstrated.



We accept, as Professor Kirk was at pains to stress, that it is notoriously difficult to make a reliable prediction as to the sea level change that will affect the subject land as far ahead as 2050, let alone beyond that. Nevertheless, we consider that the best prediction currently available of the likely sea level rise that will affect the country generally as at 2050 should be adopted. In this regard, we note Professor Kirk's reference to Dr Hannah's "most likely" sea-level rise scenario of an 0.2m to 0.4m increase in mean sea level by 2050 - a range which coincidentally results in the IPCC 0.3m estimate falling squarely in the middle. However, there is another aspect of particular concern regarding the subject land. It was discussed by Dr Gibb in his evidence as follows (paragraph numbers omitted):

> "The Bay of Plenty region is known to be one of the most rapidly deforming parts of a tectonically active country. The Rangitaiki Plains are characterised by tectonic downdrop rates of -0.4 to -2 mm/year with shoulder uplifts of about 1 mm/year. During the Magnitude 6.3 Edgecumbe earthquake of 1987, a large part of the plains subsided by up to 2m, consistent with the long-term trend. On the 23 and 24 August 1993 I found widespread evidence that Ohiwa Harbour, like the Rangitaiki Plains, has undergone tectonic downdrop since sea-level stabilised at its present level about 6500 years ago. There are extensive peat deposits and a lack of any preserved beach ridges in the valley floors-at the head of the harbour. The paddocks in the Harrisons Road area are about 0.2 to 0.4 m below MHWS and require pumping to avoid an influx of sea water at high tide. The Nukuhou River is tidal for several kilometres upstream from its mouth. I found no estuarine deposits during excavations at the back of the coastal plain near Harrisons Road to a depth of -0.8 m below MSL Moturiki. Had the area been tectonically stable or emerging there would almost certainly have been beach ridges evidence on the Holocene coastal plain within the valleys.
>
> Field evidence is consistent with tectonic downdrop at the Waimana site on Ohope Spit as well. Undated stumps from a drowned forest presently occur on the tidal flats in front of the site at 0.2 to 0.4 m below MHWS and up to 22 m seaward of the present erosion scarp. In my opinion the ancient forest could not have survived unless the land on which it grew was at least 0.6m above MHWS. The sea rafted Taupo pumice shoreline deposited about 1800 years ago at a sea-level close to that of the present day now lies about 0.3 to 0.4 m below highest spring tide level. This would suggest a low rate of tectonic downdrop of the order of -0.2 mm/year for the Waimana site. On this basis, I have adopted a tectonic downdrop rate of -0.2 mm/year for the Waimana Subdivision site."

Professor Kirk, for his part, was not prepared to accept that the existence of tectonic downdrop as asserted by Dr Gibb was sufficiently clear on the historical data available. Despite this difference of opinion, we are not prepared to gainsay the possibility that downdrop at the rate advance by Dr Gibb is indeed happening

and likely to continue. As to the "factor of safety" to be applied, Professor Kirk stated:

> "It has been the practice with river stopbanks in the region to allow a "freeboard factor" of +0.5m to design water levels. This practice is not familiar to me since my expertise and experience lies with coastal protection structural and planning practices. The technical reasons why a figure of 0.5m has been adopted are not known to me, and prior to the Munro case I had never known such a factor to be applied to waves and water levels in a coastal context.
>
> At WDC I argued that instead of adopting a figure for "freeboard" it would be technically more satisfactory to regard this component as a factor of safety and to relate it to sea-level rise. Thus, sea-level rise has been taken as +0.3m by 2050 AD with an uncertainty band of ± 50% (+0.2 to +0.4m). If the factor of safety is taken as being +0.3m, equal to the adopted sea level rise estimate then the "freeboard" will be 0.3m and the allowance for sea-level rise has been effectively doubled. Because this term is added to the total of the other terms the "freeboard" is that which will exist at 2050 and a considerably larger margin will exist in the interim. This can also be seen as an extension for the "lifetime" of the development by those parties who choose to see the sea-level rise time frame as a determinant of subdivision "lifetime". I note that the BOPRC extreme sea level policy document adopts 0.3m as a factor of safety, but that Mr. Pemberton advocates 0.5m in the present case."

Having reflected upon these remarks, in conjunction with the remarks of others on the freeboard issue (including what Dr Gibb had to say on the tectonic downdrop aspect), we think it would be appropriate to adopt an 0.4m margin, all things considered. Therefore, accepting, as we do, Dr Gibb's detailed evidence as to the level attained in the Ohiwa/Ohope area during the Wahine storm, (the storm level having been recorded at 2.41m at the Ohope slipway which we round down (as did Dr Gibb) to 2.4m for present purposes), we consider that the minimum finished ground level for residential development should be 3.1m made up as follows:

2.4m	(1 in 100 years storm flood level)
0.3 m	(estimated sea level rise by the year 2050)
0.4 m	(factor of safety)
Total 3.1m	

On the issue of coastal erosion, Dr Gibb stated that, from a study which he undertook in 1977 of the open and exposed shoreline of Ohope Spit, (on the other side of the spit opposite the trust's land), erosion had advanced about 120m between 1886 and 1976 at a net rate of 1.33m per year. By contrast, he observed

that, from a comparison of shoreline positions on the Ohiwa side of the spit surveyed in 1961 and 1993, the relatively sheltered shoreline adjacent to the Waimana block has retreated between two and ten metres at an average of 3m (ie, by the order of 0.1m per year). He concluded that, although the shoreline generally is receiving fresh supplies of sand from longshore drift, the sheltered shoreline within Ohiwa Harbour is starved of such supplies and is eroding very slowly in consequence.

While respecting what Professor Healy and Professor Kirk had to say on the question of the likely rate of future erosion, (the former being of the view that the future rate will be significant and the latter being that the land is subject to a "very mild" rate of erosion), we were impressed by Dr Gibb's evidence stemming from his long-term studies and continuing interest in relation to this particular shoreline and the coastal processes affecting both sides of the spit. In other words, we accept that the future rate of erosion of the trust's land is not likely to be as drastic as suggested by Professor Healy. But although the rate identified by Dr Gibb may be thought small on a per annum basis, in planning ahead for the reasonably foreseeable future it cannot be said that the cumulative erosion anticipated to occur should be regarded as of little moment. We refer further to this aspect in our final evaluation.

4. The Planners' Evidence

Evidence was provided by three planning witnesses, Mr Martin for the applicant, Mr Mandemaker for the regional council and Ms Izzard, called at the instance of the appellants to produce and confirm the contents of her report originally furnished to the district council. Ms Izzard was of the view in her report that the district council's request for a new scheme plan, excluding land below 2m Moturiki Datum and preserving the character of the coastal environment, "should stand". She considered that the applicant had not addressed these concerns and that it was not sufficient simply to resubmit the original scheme plan in the hope and expectation that the council would have a change of heart. However, as events proved, the council was persuaded to alter its stance in the light of the trust's objection to its initial decision, despite Ms Izzard's advice.

It should be recorded that the trust did put forward a slightly modified plan (No 62642/11/A) in which an attempt was made to exclude the wetland from the subdivision area simply by decreasing the size of sections so that a similar number

would result. Ms Izzard was of the view that "this is obviously even more at variance with the need to protect the character of the area". We agree. However, the trust's current proposal is to fill the wetland area, with the minimum finished ground level for residential development within the subdivision being 2.8m pursuant to condition (ii) of the council's decision.

Ms Izzard further advised in her report:

> "(a) That consideration should be given to large lot or cluster housing development that can avoid those areas of the site that are low lying or require to be filled to achieve minimum levels.
>
> (b) That note be taken of the need to provide for stormwater disposal on areas other than reserves.
>
> (c) That every attempt should be made to recognise that the subject land is part of the Ohope harbour and coastal environment and not simply a block of Residential A land.
>
> (d) (not relevant for present purposes)"

In consequence of these suggestions, Ms Izzard recommended that stage III should not be allowed to proceed in the form proposed, primarily on the basis of the applicant having failed adequately to address s 3(1)(c) of the Planning Act.

Mr Mandemaker referred to various policies and objectives in the Bay of Plenty regional planning scheme, emphasising the importance of the coastal environment in regional terms. These policies, of course, echo the matter of national importance in s 3(1)(c), recognised again under s 6(a) of the 1991 Act, albeit with the word "inappropriate" qualifying the words "subdivision use and development" in lieu of "unnecessary". (For a commentary upon the wider connotation imported by the altered word in s 6(a), we note in passing the judgment of Greig J in *New Zealand Rail Limited v Marlborough District Council* (High Court, Wellington Registry AP No 169/93), at p 19 of the judgment.)

Relying where necessary upon the evidence of Professor Healy and Dr Gibb, Mr Mandemaker considered that the applicant had not established a sufficient case to warrant approval, particularly having regard to s 274(1)(d) and (f) of the Local Government Act 1974. Moreover, "the circumstances of the land swap" as he described them, were not seen as sufficient reason to warrant approval against the concerns raised as to potential sea inundation. Mr Martin, for his part, felt that:

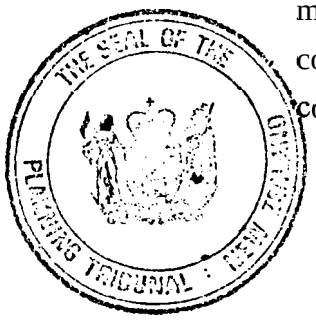
> "The natural character of the coastal environment will not be destroyed by the subdivision, either above or below the 2.45 metre contour. There will inevitably be some change but it will only reflect the final act in a planned residential development of a type already in existence in the vicinity."

Mr Martin also thought that land within the coastal environment worthy of protection from subdivision and development had either been earmarked for reserves or has already been included within the estuarine protection area (see map 62642/12/9). He also relied upon Professor Kirk's view as to the sufficiency of condition (ii) of the council's decision to ensure that the land to be developed would not be subject to inundation by the sea.

Before leaving Mr Martin's evidence at this point, we should note that, as the hearing proceeded, he acknowledged, in response to tentative thoughts raised by the Tribunal, that development on certain lots should be restricted in height to lessen the likely visual impact when viewed from the harbour. Counsel for the applicant, by leave of the Tribunal, consequently filed and circulated a memorandum stating the applicant's proposals for modifying the council's conditions of approval in the event of our otherwise upholding the proposal. In particular, it was suggested (inter alia) that no building should be erected on any lot having "a floor level for any habitable room which is below RL 3.30m, Moturiki Datum". Further, a condition was proposed that:

> "No building or structure shall be erected on the following lots, nor shall any tree be grown or permitted to grow and remain at a height exceeding a horizontal plane of:
>
> (i) RL 8.80 metres, Moturiki Datum, on lots 44-47, 55-60, 94, 95, 98, 99, 101, 102, and 103;
>
> (ii) RL 10.00 metres, Moturiki Datum, on lots 41-43, 48-54, 96, 97 and 100;
>
> (iii) RL 11.00 metres, Moturiki Datum, on lots 29-32, 34, 35, 39, 40, 92 and 93; and
>
> (iv) RL 12.00 metres, Moturiki Datum, on lots 12-22, 33, 36-38."

We are not sure why the condition extends to limiting the height of trees in addition to buildings. Even so, nothing more need be said now about the memorandum, save to note that we do not consider that the modifications to the council's conditions as suggested would suffice to warrant our upholding the council's decision based on the current scheme plans - given our views relating to



the likely effect of the subdivision and consequential development upon the natural character of the coastal environment.

5. Evidence of Others

We acknowledge first, under this head, the evidence of Mr S J Smale, a conservancy landscape architect employed by the Department of Conservation, called by Mr Cooney. We found his evidence helpful in assessing the effects of the proposed subdivision on the natural character of the coastal environment.

Other witnesses not thus far mentioned were Mr G J Dickson, Mrs E H Harrison and Mr B C Marshall - all appearing in support of the appeals by themselves and others. Their evidence was largely directed to concerns over the likely impact of the proposal upon the natural character of the coastal environment and to fears that the applicant, if allowed to proceed, could not be trusted, through its advisers, to implement the subdivision with due care and sensitivity, remembering the manner in which previous earthworks had been undertaken, particularly in reference to the filling of the depression area earlier discussed.

Having considered the background relating to this incident in the light of our own inspection of the area, we do not consider that the matter should be held against the applicant which has, at all times, relied in good faith upon professional assistance and advice. Furthermore, we accept that, however remiss Mr Martin's firm was in thinking that approval of the engineering plans for stage II also authorised earthworks on part of stage III, the matter was regularised by the consent finally given by the district council through its Chief Planner.

Another witness of note was the applicant's Chairman, Mr Hunia, to whom brief reference was earlier made in the introductory section. Mr Hunia spoke of the long association of Maori people with the spit. In particular, he spoke of the blocks known as 251 and 252 as having been returned to Ngatiawa after confiscation last century, and, in turn, divided by the Paramount Chief Rangitukehu between Ngati-Pahipoto, Ngai-Tamaoki and Ngati-Tuwharetoa - the beneficiaries of the trust being descendants of these people. Much of the 251 block and part of 252 block lies eastwards of the land under appeal. Mr Hunia stated that "it now forms part of other Crown landholding which was never returned to Ngatiawa and which is designated as reserve". He continued (paragraph numbers omitted):

> "Around 1974-75 the Crown had sought to exchange some of the land which had been retained (part of 582 Block now included in the Trust's subdivision and generally the lower lying land) with most of the 251 Block and some 252 Block land, generally in the vicinity of the higher ground around the main dune (to the northeast of the subdivision) which acts as part of the spine of the Ohope Spit.
>
> It was a consequence of agreement reached in 1975 that the Trust was established by the Maori Land Court in 1976 and the exchange of land between Maori owners and the Crown was approved."

Later in his evidence, he stated:

> "Although the Waimana 251/252 land was in more recent times occupied by members of the families by communal use of baches erected near the harbourside, it was papakainga in the traditional sense. But its importance in historical and cultural terms remains significant. Steps have been taken to preserve the historical and cultural links of the land to the 'Mana Maori' by the creation of Maori Reservations and in resolving to use the funds generated by the sale of the land to promote other benefits for the families who make up the beneficial owners.
>
> The retention of the Reservation along the harbour also retains for Maori the traditional link with the harbour and access in a spiritual as well as a physical sense, to its food supply."

Counsel for the trust, in the light of Mr Hunia's evidence, submitted that considerations under s 3(1)(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") need to be weighed alongside s 3(1)(g) ("The relationship of the Maori people and their culture and traditions with their ancestral land"). In response, it was argued by those opposing that stage III is purely and simply a continuation of what has, at all times, been a commercial venture by the trust. Further, it was said that the aspirations of the trust in providing housing elsewhere for beneficiaries and their families together with educational opportunities, however laudable, are irrelevant for the purposes of s 3(1)(g). Mr Hunia, however, indicated that at least some of the sections in stages IIA and IIB have been, or are being, allocated to beneficiaries of the trust, with the prospect that various stage III sections will likewise be either purchased or leased by beneficiaries in satisfaction of their interests. We asked that further evidence be provided bearing on these matters. In a supplementary statement Mr Hunia had this to say (paragraphs numbers omitted):

> "There was little interest from owners in taking a section in the Stage I development of 20 sections.

> The real interest is in acquisition of sections lying closer to the harbour. Also, the Trustees discouraged acquisitions in Stage I because:
>
> (a) The proceeds were needed to meet development costs and costs arising from the drawn-out process of obtaining development plan and scheme plan approvals; and
>
> (b) A proper discussion concerning equity between owners with unequal shares in the land had not taken place.
>
> In Stage II the Trustees have proposed that seven lots be allocated to owners. From Stage IIA, Lot 85 has been identified specifically. A further two will be made available once enough lots have been sold to pay off the loan obtained to cover development costs. A further four lots are intended to be allocated to owners in Stage IIB."

Mr Hunia went on to mention a meeting of beneficiaries held in late 1991. He said that at that meeting the authority for the trustees to proceed with stage II was given. The following resolution was also passed:

> "That this meeting instruct the trustees to obtain the urgent approval of the Whakatane District Council to stages Three and Four of the development and that the Council be advised of the urgent need of the Trust to provide residential sections for owners and to obtain monies to develop housing for owners."

Plainly, the reference to "owners" in the resolution was to beneficiaries of the trust. According to Mr Hunia, considerable discussion was had concerning equity between various owners with larger and smaller shareholdings, against the background of the overall number of sections having decreased from that which was hoped for originally - presumably because of the amount of land set aside for reserve purposes. Discussion was also had concerning a proposal by Mr Martin that owners with insufficient shares to acquire a freehold interest in a section could, instead, be granted a long-term leasehold interest.

We are satisfied, from Mr Hunia's evidence, that a purpose of the trust in proceeding with stage III is to provide further sections for beneficiaries to acquire and develop, in order to live on the land derived from their ancestors. We were informed that the current thinking is that at least twenty sections in stage III will be set aside for trust beneficiaries. We note, as well, the trust's desire to assist other beneficiaries in establishing themselves elsewhere and to foster educational needs - utilising for these purposes profits derived from section sales to persons outside the trust. We reserve our further remarks in reference to s 3(1)(g) till later.

6. The Status Issue

It will be recalled that the status of all the appellants is disputed by the trust. The district council evinced support for the trust's position, although Mr Green indicated that his client is prepared to abide by our decision on the regional council's status. It will be convenient to consider that body's position first.

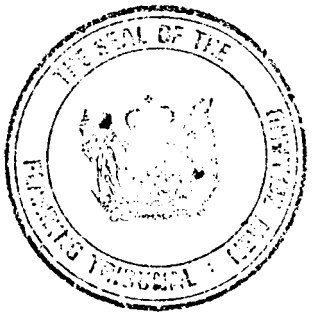
Section 300(1) of the Local Government Act 1974 provides:

> "(1) The following persons may appeal in the prescribed manner to the Planning Tribunal against any decision of the council ... under any provision of this Act specified in s.299(1) of this Act ... :
> (a) The owner of the land:
> (b) Any owner of land affected by the decision, or any other body or person affected by the decision:
> (c) Any Minister of the Crown:
> (d) Any local authority affected by the decision."

The regional council claims to be a local authority affected by the decision. It is common ground that the regional council falls within the term "local authority" for the purposes of the Act and the subsection. The question is simply whether it is a local authority affected. We observe that s 300(1) is similar to section 2(3)(c) of the Planning Act, but without the category "any body or person representing some relevant aspect of the public interest" provided for in s 2(3)(d). We were referred to the well-known case of *Blencraft v Fletcher Development Company* [1974] 1 NZLR 295, where it was indicated that the test is whether an appellant can demonstrate that it will be, or is likely to be, affected in some appreciable degree greater than, or in a manner different from, the degree or manner in which others generally will be affected. This test was followed in *Swartz v Wellington City* 12 NZTPA 187.

The regional council was constituted in 1989 pursuant to a re-organisation order made under s 15B of the Local Government Act 1974. The order conferred a number of functions and duties including:

(i) The functions, duties and powers in relation to regional planning of a regional council under the Planning Act (now succeeded by the 1991 Act).



(ii) The functions, duties and powers of a catchment board and a regional water board under the Soil Conservation and Rivers Control Act 1941, and the Water and Soil Conservation Act 1967 or any other Act.

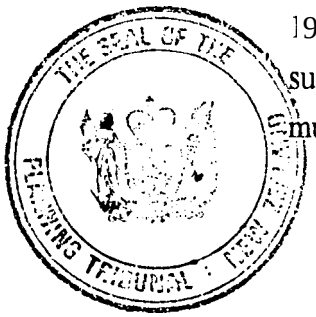
When the regional council was constituted there existed in the Bay of Plenty a regional planning scheme, for which the new council assumed responsibility in administration. That scheme contains objectives concerning promotion of wise use and management of coastal and marine resources, as well as conserving the area's natural character, including the beach dune system, wetlands, estuaries, aquatic life and quality of water. Reference is also made in the scheme to rationalising and co-ordinating planning and development of the land/water interface. The following policy also warrants noting:

> "To protect the coastal areas from subdivision and development where this would detrimentally affect the natural character and coastal area, and particularly ecologically sensitive areas, and where there is danger of coastal erosion."

Significantly, the regional council, being a catchment board under the Soil Conservation and Rivers Control Act 1941, has certain functions, including that contained in s 126(1), as substituted by s 362 and the Eighth Schedule of the 1991 Act, as follows:

> "(1) It shall be a function of every Catchment Board to minimise and prevent damage within its district by floods and erosion."

Under the Local Government Amendment Act (No. 2) 1989, a new section was inserted in the principal 1974 Act (s 37S) which, in effect, confirmed the functions, duties and powers of the regional council set out in the re-organisation order. Section 37S was further amended on 1 July 1992 by s 6 of the Local Government Amendment Act 1992. The upshot was that the powers of the regional council were altered in various respects, including conferment on the council of the functions, duties and powers of a regional council under the 1991 Act. The function under s 126(1) of the Soil Conservation and Rivers Control Act 1941 remained unaffected. Although s 403 of the 1991 Act provides that for the purposes of these proceedings, Parts XX and XXI of the Local Government Act 1974 are to apply as if the 1991 Act had not been passed, we agree with the submission of counsel for the regional council that, for present purposes, regard must sensibly be had to the general functions of the regional council under the



1991 Act. The functions relevant for present purposes are those set out in s 30(1)(c) as follows:

> "(c) The control of the use of land for the purpose of -
>
> (i) Soil conservation:
>
> ...
>
> (iv)„ The avoidance or mitigation of natural hazards:
>
> ...

Under s 403, a subdivisional proposal such as the present one is to be considered and dealt with under the former Local Government Act regime during the transitional period. But we agree with Mr Cooney that this does not derogate from the general functions of the regional council provided for in s 30 of the 1991 Act and conferred on the council by s 37S of the Local Government Act 1974. Given its functions under both s 126(1) of the Soil Conservation and Rivers Control Act 1941 and s 30(1)(c) of the 1991 Act, we reject the contention advanced for the applicant that the regional council lacks status.

We now turn to the status of the second appellants, Mrs E H Harrison and the Royal Forest and Bird Protection Society of New Zealand Inc. Mrs Harrison resides at 192 Harbour Road, about 2.3 km away from the trust's land. She said that, for her own part, she had appealed as a resident of Harbour Road concerned about the "precedent effect"; also on account of her interest as a periodic visitor to the area by way of beach walks and the like. Having carefully considered all that Mrs Harrison had to say in support of her own position as to status, we consider that she is not sufficiently proximate to the subject land to warrant her claim to be a person affected by the district council's decision. It must be appreciated that the distance factor is relative, depending upon the particular case. In a more isolated environment a person two or three kilometres away might well be affected. But here, Mrs Harrison is, in our view, no more affected than other residential inhabitants of the spit two kilometres or more removed from the subject land. As a matter of degree, and having regard to the nature and background of the case, we hold against Mrs Harrison's status.

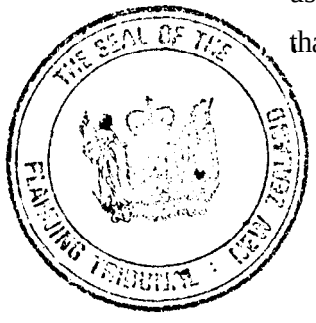
As to the Royal Forest and Bird Protection Society Inc, we are again not persuaded that this body is entitled to claim status. In cross-examination Mrs Harrison acknowledged that the society's headquarters are in Wellington and that it has no land ownership interest at Ohiwa. Although the society would doubtless qualify under s 2(3)(d) of the Planning Act were the case under that Act, because

the category of a body representing some relevant aspect of the public interest is not recognised under s 300(1) of the Local Government Act 1974, the society cannot claim to be affected over and above any other body or person having a particular interest in protecting the natural character of the coastal environment and/or preserving native vegetation and wildlife habitats. We thus hold that the second appellants are without status.

As to the third appellants, Mr B C Marshall and Whakatane Friends of Maruia, we consider, in Mr Marshall's case, that he does have status, being resident at 424 Harbour Road on one of the lots in stage I. Mr Marshall's property overlooks the stage III area and we are satisfied that he has a sufficient connection and interest to claim to be a person affected by the district council's decision concerning the manner in which stage III is to be subdivided and laid out for development purposes. We uphold his standing in the proceedings.

As to the Whakatane Friends of Maruia, we were given to understand that they comprise a group of Whakatane members (including Mr Marshall) of the well known Maruia Society Inc - although there was a suggestion that the group is not one formally recognised by the parent body. Be this as it may, we consider, having reflected on the evidence and submissions, that the group concerned falls within the same position as the Royal Forest and Bird Protection Society Inc. In our opinion, it does not have standing, even though it may well have qualified were there a category recognised in s 300(1) comparable to that in s 2(3)(d) of the Planning Act.

As to the fourth appellants, Mr J G Dickson and Green Environmental Society, we hold that neither party has status. Mr Dickson, for his part, resides in Pohutukawa Avenue, Ohope, about 5.7 km away from the trust's land. He is a former chairman of the Bay of Plenty Conservation Board, but is no longer on that board. He said that he "takes food from this area" and uses the general area of the spit once a fortnight for rugby league training - although not as a member of any rugby league club. While we accept that Mr Dickson is a person who, in view of his past experience with the board mentioned and for other reasons relating to his personal background, has a strong interest in protecting the environment of the spit and associated harbour area, we are not persuaded, any more than with Mrs Harrison, that Mr Dickson's claim to status is well founded.



As to the Green Environmental Society, Mr Dickson testified that this is a body of persons interested in maintaining and enhancing the local environment. It invites guest speakers to address members from time to time on matters such as water quality and wetlands. He said that the group also calls public meetings from time to time to discuss environmental issues affecting the area generally - such meetings being rallied either by local radio message or newspaper advertisement. All things considered, we find that this body, like the Whakatane Friends of Maruia and the Royal Forest and Bird Protection Society Inc, is without status.

Returning to Mr Dickson's own position, we should add that his chairmanship and position on the board earlier mentioned terminated in August 1993, after the lodgment of his appeal. Even so, we do not regard his position on the board as sufficient to vest him with status personally. Perhaps the board itself might have had status to appeal. We make no finding on that. But there is no suggestion that Mr Dickson appealed in his capacity as chairman of the board, and hence, on behalf of the board. Rather, he appealed as an individual with a particular interest in environmental matters. While not doubting the sincerity of his concerns, (nor for that matter the sincerity of Mrs Harrison), Mr Dickson, like Mrs Harrison, fails to qualify as a person affected by the decision for the purposes of s 300(1)(b).

7. Consideration of the Merits

In approaching our evaluation, it will be as well if we begin by restating certain basic propositions or views. First, stage III as proposed represents a continuation of the conventional suburban residential layout design adopted and approved for stages I and II. Secondly, the stage III area, as with the stages preceding, lies within the coastal environment. Section 3(1)(c) of the Planning Act must therefore be afforded due consideration. We turn for assistance to the pertinent authorities shortly. Thirdly, the reserves provision made or to be made by the trust, ranging in width from 40 m to 120 m, particularly the area zoned for estuarine protection (see plan 14745/12), is a significant contribution to public amenity. Fourthly, the freshwater wetland so-described (earlier discussed in heading 2) occupying some 2,000m^2 within the stage III area and some 3,000m^2 of the Crown reserve land to the east, has such a vestigial ecological quality as not to warrant special protection within stage III - being only marginally distinguishable from the surrounding dune lands. Fifthly, the gabion wall (also discussed earlier in the same section), when filled with soil so as to encourage growth of natural vegetated cover, would produce a compatible visual effect and not result in an obtrusive demarcation

between the residential development and the reserve lands to the east. Lastly, we consider that condition (ii) as imposed by the council must be revised, given the low-lying nature of the subject land and the potential sea inundation aspect which was focused upon under the regional council's appeal.

As was to be expected, submissions were advanced from more than one quarter that the proposal would give rise to "unnecessary development" within the meaning of s 3(1)(c) of the Planning Act. In the *Environmental Defence Society* case (supra), Cooke P stated in a well-known passage (p 203):

> "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 para (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* NZLR 423, 430; *Commissioner of Stamp Duties v International Packers Ltd* [1954] NZLR 25, 54 per North J in this Court. But the test is no light one."

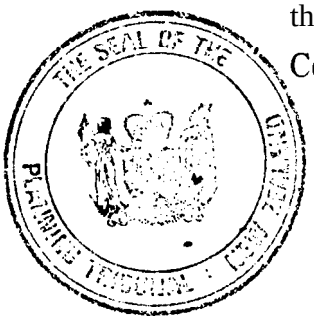
At pp 218 and 219 of the report, McMullin J stated:

> "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."

Later he said (p 220):

> "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."

Although McMullin J was in the minority in the conclusion he finally came to over the outcome of the case, the passages quoted do not appear to be at variance with the views of the majority. Somers J (concurring with the majority which included Cooke P) made the following (again oft-quoted) statement (p 223):



> "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."

And later he said:

> "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 paragraphs (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) seems 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 same learned Judge, delivering the principal judgment in the *Opoutere Residents* case (supra), stated at p 451:

> "The present case was, as the Tribunal rightly said, concerned with paras (a), (b) and (c) of s 3(1) of the Act; it involved a remote coastal area, a small settlement and a wildlife refuge. Under para (c) the natural character of the coastal environment is to be protected against unnecessary development. It is for a developer to show a necessity sufficient to override those national interests. I doubt whether that could be achieved by demonstrating that many people wish to camp or stay in a comparatively undeveloped part of the coast when many other parts of the same coast afford all types of accommodation. One of the objects of para (c) must be to prevent that happening.
>
> Nor can it be right to speak of a 'case for the refusal of consent'. The interests protected by s 3(1) are such that the proper question is whether the applicant has made out a case for the giving of consent in circumstances where the stated national interests have primacy."

In the *Environmental Defence Society* case reference was also made to s 3(1)(g) - a paragraph pointed to by counsel for the applicants in the present case as requiring consideration along with s 3(1)(c). Paragraphs (a) and (b) were also pointed to, but we do not consider those nationally important matters to be applicable in the

present circumstances. Obviously, as Somers J pointed out, the coastal environment may be seen by some as a resource to be availed of for the benefit and enjoyment of people. But we hold, in the light of the elucidation afforded by the dicta cited above, that it is simply paragraph (c) that needs to be addressed. However, we find that paragraph (g) requires to be weighed in the light of our earlier remarks in reference to Mr Hunia's evidence. An objective of the subdivision is to allow some members of the trust at least to maintain a direct relationship with the land - such land having been vested in the trust in the circumstances earlier explained. The subject land is unquestionably part of the spit area which was occupied in centuries past by ancestors of those people who make up the trust. While the trust has varied aims in seeking to proceed with the subdivision, we accept that one aim is to enable a cross-section of trust members to obtain sections for development purposes, so that the relationship of those persons with their ancestral land may be strengthened and confirmed.

As to paragraph (c), we are under little doubt that the size and nature of the proposal as it stands constitutes "unnecessary development" and ought not to be endorsed. We accept the views expressed by such witnesses as Ms Izzard and Mr Smale in this regard. Weighing paragraph (g) in the balance, we still regard the proposal as unsatisfactory in terms of its likely impact upon the natural character of the coastal environment. The subdivisional standards employed in stages I and II, and proposed to be carried forward to stage III, are not sympathetic to the locality and, indeed, are incongruous in their impact upon the area. However, we have been able to identify a route which we think would produce a satisfactory solution. Given the height control suggestions and allowing for a reduction in the number of lots by approximately one-third (with a resultant increase in the sizes of those lots on the part of the site generally fronting the foreshore reserves area and the eastern boundary as it approaches the foreshore) - we envisage that a good transition would be able to be achieved between the conventional suburban development pattern to the west and the natural coastal dune landscape of the reserve lands to the east. It is, indeed, most important in our judgement that a suitable gradation is achieved via the stage III area, so as to avoid the harshness of an abrupt transition from the impact of suburbia inherent in stages I and II, and the wilderness character of the open space area eastwards of the trust's land.

We pause here to say that, in deciding that an amended plan must be called for, we have not overlooked the concern expressed by Mr Hunia to the effect that the trust's profit out of the whole subdivisional operation (incorporating all stages) is

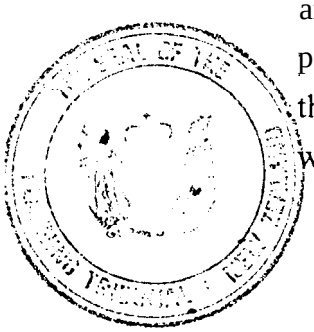
effectively centred in stage III. Nevertheless, making all due allowance for the residential zoning of the land and the trust's expectations arising from the zoning, we cannot regard the trust's financial aspirations as of sufficient moment to warrant our coming to some different conclusion. Were the sole purpose of the subdivision to facilitate settlement of trust members on the land, the financial aspect might well have attained greater moment in our overall consideration of the case. But, as earlier indicated, only some of the sections are anticipated to go to members of the trust. And on this score it is by no means certain how many members will actually settle and remain on the land. Significantly, no evidence was called from any member of the trust to attest to his or her intention to acquire a section in order to build on and inhabit the land on a long term basis. Neither did it appear on the evidence that any covenants had been entered into between the trust and individual trust members committing parties on either side to any particular arrangements. Nevertheless, we bear in mind that some sections have been, or are being, utilised by trust members in stages I and II, thus giving rise to the likelihood of further utilisation within stage III. In the end, we have felt able to afford some weight to s 3(1)(g). But the degree of weight has had to be tempered, given the uncertainties we have outlined, and not forgetting, of course, that at the end of the day a spectrum of differing matters is required at law to be addressed - including the potential sea inundation aspect, our finding on which alone necessitates a reconsideration of the subdivisional design.

Two further points warrant mention. First, we consider that re-contouring of the sand dunes is required in order to produce finished ground levels sufficient for residential development - that course to be taken in conjunction with the imposition of suitable building height restrictions and a limitation of one dwelling to each site. In the course of our inspection it was apparent that, viewed from the harbour, the trust's land is a low-lying saddle between higher land to the west and east. This being so, we regard careful contouring to a minimum ground level as supportable, in preference to terracing of individual sections to achieve suitable building platforms. Basically, the approach we envisage is to allow for efficient subdivisional design, but with commensurately larger (and hence fewer) lots facing the foreshore and abutting the eastern boundary towards its southern end - the overall objective being a mode of subdivisional design and development that will result in a sensitive transition between stages I and II and the area to the east. Furthermore, the larger foreshore-facing sites would, we anticipate, introduce greater leeway for meeting future effects of coastal erosion - with the possibility that parts of such sites might be acquired (subject, of course, to compensation

rights) for reserves purposes, so as to supplement the diminished land then available for public access enjoyment. The second point is that the need for, and desirability of, providing vehicular, (as distinct from pedestrian), access through stage III to the foreshore requires reassessment, given the existence of a well-developed public boat ramp on the reserve land to the east, and bearing in mind the gratuitous traffic generation that would otherwise result, with a consequential demand for parking spaces and constant crossing of trailers over the Estuarine Protection zone area. The new plan would also be expected to embrace a roading layout and standard more appropriate to the area and in keeping with the more modest needs and expectations of a reduced number of eventual section owners.

In summary, we consider that a redesigned plan along the lines mentioned would comply with relevant considerations under the Local Government Act 1974, particularly s 274(1)(a), (d) and (f). We apprehend that an amended proposal as envisaged would still have some visual effect upon the existing character of the area. However, such a proposal would, we think, meet the "necessary test" of s 3(1)(c) (to the standard propounded by Cooke P in the *Environmental Defence Society* case), in view of the need to achieve a suitable gradation between what has already been approved (however inappropriate) with regard to stages I and II and the area to the east. It is, we think, not overstating the position to say that this can be viewed in a context of national importance, bearing in mind the importance of the spit in the Bay of Plenty and the particular importance of the easternmost reserves end and the critical interfacing position of the subject land. We recognise that some may suggest that protection of the natural character of the area would be better served by not subdividing the stage III land at all. None of the parties before us appeared to go that far, the common theme being that the trust should produce a scaled-down proposal more in keeping with the location. Having reflected on the "do nothing" alternative, we retain the view that the gradation aim is both appropriate and reasonably necessary in order to round off the built form within the coastal environment and thus render the transition eastwards, when viewed both from the harbour and on the spit itself, coherently pleasing.

For the reasons we have endeavoured to express, the proceedings are adjourned to enable the trust, with the assistance of its professional advisers, to prepare an amended scheme plan for lodgment with the Tribunal and service upon other parties (save those found not to have status) as soon as possible - following which the proceedings will be set down for further hearing. In preparing the new plan, we expect the trust's advisers to bear in mind the various points raised in this



decision, including, of course, our finding on the required minimum finished ground level for residential development. Heed ought also to be taken of various pointers advanced during the hearing as to how a revised subdivisional design could conceivably be undertaken, were we to conclude, as we do, that that course should be adopted,

Addendum: On the roading aspect, we recall an assertion by Mr Martin that the council had been unwilling to depart from the full standard applicable to an ordinary residential subdivision, But we apprehend that that may well have been in reference to the size and density of the trust's proposal to date. With a less intensive subdivision in a location such as this, we anticipate that an adjustment in the standard would be both feasible and desirable. However, if this course should not be acceptable to the council for some reason, then evidence on the matter is to be adduced on the council's behalf at the resumed hearing

Costs are reserved

DATED at AUCKLAND this 17th day of January, 1994

R J Bollard
Planning Judge

(DE-0081.DOC)

THE SEAL OF THE PLANNING TRIBUNAL : NEW ZEALAND