IN THE COURT OF APPEAL OF NEW ZEALAND

CA285/05
[2007] NZCA 473

BETWEEN	COROMANDEL WATCHDOG OF HAURAKI INCORPORATED Appellant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF ECONOMIC DEVELOPMENT First Respondent
AND	NEW ZEALAND MINERALS INDUSTRY ASSOCIATION Second Respondent
AND	AUCKLAND CITY COUNCIL First Intervener
AND	AUCKAND REGIONAL COUNCIL Second Intervener

Hearing: 31 July 2007

Court: Glazebrook, O'Regan and Arnold JJ

Counsel: R B Enright and B E McDonald for Appellant
H B Rennie QC and R M Macky for First Respondent
R A Fisher and M L van Kampen for Second Respondent
M E Casey QC for First and Second Intervener
Vanessa Evitt for First Intervener
L S Fraser for Second Intervener

Judgment: 31 October 2007 at 11.30 am

JUDGMENT OF THE COURT

A **We answer the question for which leave to appeal was given as follows:**

Did the High Court err in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration?

Answer: Yes.

B **We remit the matter to the Environment Court for reconsideration in the light of this decision.**

C **We award costs of $6,000, plus usual disbursements, to the appellant. Each respondent must pay half of those costs and disbursements.**

D **Any issues of costs in the High Court or the Environment Court should be resolved in those courts in the light of this decision.**

REASONS OF THE COURT

(Given by O'Regan J)

Prohibited activity status

[1] This is an appeal against a decision of Simon France J dismissing appeals by Coromandel Watchdog and the Thames-Coromandel District Council (TCDC) against a decision of the Environment Court (EC W50/2004 30 July 2004). The High Court decision is reported at [2005] NZRMA 497. It raises for consideration the circumstances in which it is proper for a local authority to classify an activity as a

"prohibited activity" when formulating its plan in accordance with the Resource Management Act 1991 (the Act).

[2] The Environment Court decision dealt with appeals to that Court against decisions made by TCDC in response to submissions made to TCDC on the decisions version of its proposed district plan in respect of mining and related activities. In essence, the complaint of the referrers (now the respondents) was that the proposed district plan provided for mining to be a prohibited activity in a number of zones, covering a substantial portion of the Coromandel Peninsula. The area in which mining was a prohibited activity included part of the Hauraki Goldfields, which are known to have significant deposits of gold and silver. The Environment Court found that TCDC was wrong to categorise mining as a prohibited activity in circumstances where TCDC contemplated the possibility of mining activities occurring, but wished to ensure that such activities could occur only if a plan change was approved.

[3] In short, the Environment Court held that prohibited activity status should not be used unless an activity is actually forbidden. In the words of the Environment Court (at [13]), prohibited activity status "should be used only when the activity in question should not be contemplated in the relevant place, under any circumstances". In particular, the Environment Court held at [12]:

> It is not, we think, legitimate to use the *prohibited* status as a de facto, but more complex, version of a *non-complying* status. In other words, it is not legitimate to say that the term *prohibited* does not really mean *forbidden*, but rather that while the activity could not be undertaken as the Plan stands, a Plan Change to permit it is, if not tacitly invited, certainly something that would be entertained.

[4] At [15], the Environment Court emphasised that:

> [U]nless it can definitively be said that in no circumstances should mining ever be allowed on a given piece of land, a *prohibited* status is an inappropriate planning tool.

[5] The Environment Court decision was essentially upheld by Simon France J.

[6] Simon France J declined Coromandel Watchdog's application for leave to appeal to this Court. TCDC did not seek leave to appeal. Simon France J did,

however, reformulate the question of law which could be put to this Court as follows:

> Did the High Court err in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration.

[7] The qualification "within the time span of the Plan" was not expressly stated as part of the test adopted by the Environment Court or approved by the High Court. That may well have been because the Judge saw it as an implicit element of the test as expressed earlier. Logically, a plan regulates (or prohibits) activity only for the life of the plan.

[8] Coromandel Watchdog then sought special leave from this Court, and that was granted on the question of law which had been formulated by Simon France J (see [6] above): CA285/05 6 April 2006. In the same judgment, this Court granted leave to the Auckland City Council and the Auckland Regional Council to intervene.

Issues for determination

[9] The principal issue for determination is framed by the question of law on which leave to appeal was granted. However, it became apparent during the hearing that neither of the respondents disputed that prohibited activity status may be justified in a number of circumstances which were identified by the interveners. The most significant of these is where a planning authority has insufficient information about a proposed activity and wishes to take a precautionary approach, even though it does not rule out the possibility of that activity being permitted in the future. This meant that the focus of the appeal was on the extent to which the apparently absolutist position outlined in the decisions of the Courts below prevented the allocation of "prohibited activity" status in such circumstances, and if it did, whether it was therefore shown to be wrong.

[10] A subsidiary issue which also requires determination is whether we should remit the matter to the Environment Court for reconsideration in the light of our decision.

[11] Before commencing our consideration of these issues, we propose to set out the factual context, and the relevant statutory provisions.

The factual history

[12] The decisions version of the proposed district plan provided that mining would be a prohibited activity in the conservation and coastal zones, and in all recreation and open space policy areas. In all other zones and policy areas, it provided that mining was a non-complying activity. The respondents, the Ministry of Economic Development and the New Zealand Minerals Industry Association (NZMIA), were both concerned about this. The Ministry's interest is because of its responsibility for mineral markets and industries, and its management of Crown minerals. It indicated that it wished to see the proposed district plan give appropriate recognition of mineral and aggregate resources, and provision for their use. The NZMIA had a similar interest. It represents mining and quarrying companies, as well as others involved in the minerals sector.

[13] Prior to the Environment Court hearing, TCDC modified its stance and moved towards the respondents' positions, but not to their satisfaction. On the other hand, Coromandel Watchdog, which is an environment group seeking to protect the Coromandel Peninsula from precious metal mining in inappropriate places and of inappropriate scale, sought to uphold the decisions version of the proposed district plan (ie the version prior to TCDC's modified stance).

[14] The Environment Court said at [2] that it had, with the agreement of all parties, dealt with the matter "at a relatively high level of abstraction: ie to resolve the issue of an appropriate planning status for mining related activities in the zones created by the [proposed district plan]". It added: "Once that issue is resolved, attention can then be turned to the detail of the appropriate objectives, policies, rules etc".

[15] It is unnecessary for us to go into the detail of what was proposed by TCDC, and how those proposals were modified by the Environment Court. The Environment Court decision contains a useful tabular summary of the positions of

the various parties at [10], and the Environment Court's decision is also set out in tabular form at [31] (as corrected in a subsequent decision of 28 September 2004). Reference should be made to the Environment Court's decision for the details. In general terms, however, the proposed district plan as amended by the Environment Court provides that underground mining is a discretionary activity in all zones, and surface mining is either a discretionary activity or a non-complying activity in all zones other than the recreation and open space policy areas in the coastal, industrial, housing and town centre zones, where it is a prohibited activity. That is a substantially more liberal regime than the modified position taken by TCDC in the Environment Court, which still classified mining as a prohibited activity in a number of other areas and zones. It is also more liberal than the decisions version of the plan, which classified mining (not subdivided into underground and surface mining as in the modified position) as a prohibited activity in most areas.

[16] The philosophical debate which arose in the Environment Court proceedings was as to whether prohibited activity was an appropriate status where a planning authority did not necessarily rule out an activity, but wished to ensure that a proponent of the activity would need to initiate a plan change. Plan changes require a different and more consultative process than that for applications for resource consent in relation to a discretionary activity or a non-complying activity. In essence, the proponent of a plan change faces a higher hurdle. There is the potential for greater community involvement.

[17] The Environment Court made an important factual finding in its decision, which led to it criticising TCDC for inconsistency in its treatment of some activities which the Environment Court believed had essentially the same effect as mining. The Court said:

> [21] The exclusion of mining from large tracts of the Peninsula seemed to reflect an attitude towards that industry generally which is, we think, inconsistent with the attitude taken towards other activities which, depending on their nature and scale, have the potential to produce equally adverse effects. Mining was treated differently from, for instance, quarrying and production forestry. Those two activities are provided for throughout the Peninsula, mining was not. But quarrying is a subset of mining, with potentially identical effects. In the case of production forestry the noise, dust, traffic issues, indigenous vegetation issues and general visual effects are, potentially at least, similar to anything likely to be produced by a mining

> undertaking. The Decisions version defines Production Forestry as [in summary] meaning the management of forests planted primarily for logging and timber production, and including extraction for processing, and planting and replanting. Section 5, subsection 550, Table 1 – Activity Status: Rural Activities, gives it a wide gamut of activity status, depending on the zone. For example:
>
> - Rural zone outside all policy areas – *permitted*.
> - Rural zone within Recreation and Open Space policy areas – *controlled*.
> - Coastal zone outside all policy areas – *discretionary*.
> - Coastal zone within Recreation and Open Space policy areas – *controlled*.
> - Conservation zone [all parts] – *controlled*.
>
> The contrast with mining is obvious and marked. In no case is Production Forestry listed as *prohibited*.
>
> [22] To that extent, the [proposed district plan] was both internally inconsistent and not, as it should be, effects based. If it is able to deal with the effects of quarrying and forestry, then it should be able to deal with mining on equal terms. One would expect that of a Plan designed to assist a territorial authority to perform its function of the integrated management of effects under s 31.

[18] Nevertheless, the Environment Court noted (at [14]) that, whatever activity status was given to mining activities, a significant mining proposal would almost certainly require a plan change in any event.

The statutory scheme

[19] The concept of "prohibited activity" is dealt with in s 77B of the Act. Section 77A empowers a local authority to make rules describing activities in terms of s 77B. Section 77B provides for six levels of activity, with a descending degree of permissiveness. These are:

(a) Permitted activity;

(b) Controlled activity;

(c) Restricted discretionary activity;

(d) Discretionary activity;

(e) Non-complying activity; and

(f) Prohibited activity.

[20] A permitted activity may be undertaken without a resource consent. If an activity is controlled, restricted discretionary, discretionary or non-complying, a resource consent is required, with increasing levels of difficulty for the applicant: see ss 104 – 104D of the Act.

[21] The most restrictive is a prohibited activity. Section 77B(7), which deals with prohibited activity status says:

> If an activity is described in this Act, regulations or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.

[22] The effect of s 77B(7) is that the only way that a prohibited activity may be countenanced is through a change in the provisions of the plan. The plan change process outlined in Schedule 1 to the Act is different in character from the resource consent process. Counsel for Coromandel Watchdog and counsel for the interveners pointed out that the plan change process has the following characteristics:

(a) Notification and public consultation is mandatory;

(b) A cost/benefit evaluation under s 32 is required;

(c) A holistic approach is allowed for, rather than a focus on one site as happens with resource consent applications. The "first come, first served" approach which applies to resource consent applications does not apply;

(d) Any person has standing to make submissions, with a chance to make a second submission after public notification of submissions. Any person who makes a submission has a right of appeal; and

(e) The local authority considering a plan change acts as a planning authority, rather as a hearing authority as it does when considering resource consent applications. The latter role is a narrower, quasi-judicial role.

[23] The place of rules in a district plan needs to be oriented in the statutory scheme. Under s 75(1) of the Act, a district plan must state:

(a) The objectives for the district;

(b) The policies to implement the objectives; and

(c) The rules (if any) to implement the policies.

[24] Thus, the Act provides that a plan must start, at the broadest level, with objectives, then specify, in respect of each objective, more narrowly expressed policies which are designed to implement that objective. Such policies can be supplemented by rules designed to give effect to those policies.

[25] Section 75(2) allows a district plan to state a number of other factors, but this does not affect the mandatory nature of s 75(1).

[26] In formulating a plan, and before its public notification, a local authority is required under s 32(1) to undertake an evaluation. Under s 32(3) the evaluation must examine:

(a) The extent to which each objective is the most appropriate way to achieve the purpose of the Act; and

(b) Whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

[27] The purpose of the Act is set out in s 5. It is "to promote the sustainable management of natural and physical resources". "Sustainable management" is defined extensively in s 5(2).

[28] The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is "the most appropriate" status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

[29] Section 32(3) is amplified by s 32(4) which requires that for the purposes of the examination referred to in s 32(3), an evaluation must take into account:

(a) The benefits and costs of policies, rules or other methods; and

(b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

[30] The precautionary approach mandated by s 32(4)(b) is an important element in the argument before us. We will revert to it later.

[31] In addition to the cost/benefit analysis required by s 32, there are a number of other requirements which must be met by a local authority in preparing its district plan. When determining which of the activity types referred to in s 77B should be applied to a particular activity, the local authority must have regard not only to the cost/benefit analysis undertaken pursuant to s 32, but also to its functions under s 31, the purpose and principles set out in Part 2 of the Act, particularly the sustainable management purpose described in s 5, the matters which it is required to consider under s 74, and, in relation to rules, the actual or potential effect on the environment of activities including, in particular, any adverse effects (s 76(3)). The Environment Court has set out a methodology for compliance with these requirements (adapting that set out in *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481 (EC) to take account of amendments made to the Act in 2004) in *Eldamos*

Investments Ltd v Gisborne District Council EC W047/2005 22 May 2005 at [128] and [131].

Is prohibited activity status appropriate only for absolutely forbidden activities?

[32] The case for Coromandel Watchdog is that none of the requirements and criteria referred to at [31] above give any support to the restrictive interpretation given to the term prohibited activity by the courts below. Counsel for Coromandel Watchdog, Mr Enright, went further. He submitted that:

(a) The Environment Court's interpretation ran counter to the express recognition by Parliament in s 32(4)(b) of a precautionary approach;

(b) Both the Courts below had effectively imposed a new test for "prohibited activity" which was inconsistent with the plain words of s 77B(7) and the precautionary approach;

(c) The High Court imposed a new statutory test. This was acknowledged in the leave decision of the High Court, where the effect of the High Court's merits decision was described as "to circumscribe the use of 'prohibited activity' status by setting down a test which the planning authority must be satisfied is met before an activity can be prohibited" (at [14]);

(d) The decisions under appeal had imposed judge-made constraints into the complex statutory framework of the Act, and had imposed a high "under no circumstances" threshold into the test for a prohibited activity in a context where the Act did not, itself, do this; and

(e) Such a restrictive interpretation was inconsistent with the purposes of the Act.

[33] Counsel for the interveners, Mr Casey QC, supported that submission, and illustrated the points by reference to a number of different circumstances in which prohibited activity status may be appropriate, but would not be permitted if the decisions under appeal were upheld.

[34] Mr Casey accepted that the use of prohibited activity status was appropriate when a local authority had determined that an activity would never be allowed or, alternatively, would never be allowed during the currency of the local authority's plan. However, he argued that the decisions under appeal had wrongly confined the use of prohibited activity status to that situation when it may be appropriate in others. He emphasised the process requirements of the Act, and particularly the emphasis in s 32 on the "most appropriate" outcome. He suggested that prohibited activity status may be the most appropriate of the menu of options in s 77B in a number of different situations, particularly:

(a) Where the council takes a precautionary approach. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available. He gave an example of a plan in which mining was a prohibited activity, but prospecting was not. The objective of this was to ensure that the decision on whether, and on what terms, mining should be permitted would be made only when the information derived from prospecting about the extent of the mineral resource could be evaluated;

(b) Where the council takes a purposively staged approach. If the local authority wishes to prevent development in one area until another has been developed, prohibited activity status may be appropriate for the undeveloped area. It may be contemplated that development will be

permitted in the undeveloped area, if the pace of development in the other area is fast;

(c) Where the council is ensuring comprehensive development. If the local authority wishes to ensure that new development should occur in a co-ordinated and interdependent manner, it may be appropriate to provide that any development which is premature or incompatible with the comprehensive development is a prohibited activity. In such a case, the particular type of development may become appropriate during the term of the plan, depending on the level and type of development in other areas;

(d) Where it is necessary to allow an expression of social or cultural outcomes or expectations. Prohibited activity status may be appropriate for an activity such as nuclear power generation which is unacceptable given current social, political and cultural attitudes, even if it were possible that those attitudes may change during the term of the plan;

(e) Where it is intended to restrict the allocation of resources, for example where a regional council wishes to restrict aquaculture to a designated area. It was suggested that, if prohibited activity status could not be used in this situation, regional councils would face pressure to allow marine farms outside the allocated area through non-complying activity consent applications. He referred to the Environment Court decision in *Golden Bay Marine Farmers v Tasman District Council* EC W42/2001 27 April 2001. In that case, (at [1216] – [1219]), the Court accepted that prohibited activity status for the areas adjacent to the area designated for marine farming was appropriate; and

(f) Where the council wishes to establish priorities otherwise than on a "first in first served" basis, which is the basis on which resource consent applications are considered.

[35] Mr Casey noted that the requirements for district plans, to which we have referred above, are similar to those which apply to regional councils such as the Auckland Regional Council in relation to regional plans. So the concerns which have been expressed in relation to district plans arise equally in relation to regional plans.

[36] As noted earlier, both the Ministry and the NZMIA accepted that these situations could call for the use of prohibited activity status. They argued that the decisions under appeal would not prevent the use of prohibited activity status in this way. We disagree. It is clear from the extracts from the Environment Court decision that we have highlighted at [3] – [4] above that the Court postulated a bright line test – ie the local authority must consider that an activity be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate. We are satisfied that, in at least some of the examples referred to at [34] above, the bright line test would not be met. Yet it can be contemplated that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status was the most appropriate status in cases falling within the situations described in that paragraph.

[37] There was also consensus among all parties and interveners as to the process by which a local authority was required to apply prohibited activity status (or any other status under s 77B) to a particular area – (see [23] – [31] above for a description of this process). Coromandel Watchdog and the interveners argued that the question which a local authority had to ask and answer was whether prohibited activity status was the "most appropriate" for the particular area, having regard to the matters evaluated in the course of the process mandated by the Act. They argued that the Environment Court had, by substituting the dictionary definition "forbidden" for the words of s 77B(7), put an unnecessary and incorrect gloss on the words of the Act itself.

[38] Counsel for the NZMIA, Mr Fisher, argued that the test postulated in the Environment Court decision was an orthodox application of previous case law, and had been confirmed in a subsequent decision. He referred to *Bell v Tasman District Council* EC W3/2002 23 January 2002 and *Keep Okura Green Society Inc v North*

Shore City Council EC A095/2003 10 June 2003. Mr Fisher said that both these cases emphasised the limited circumstances in which prohibited activity status was appropriate. He said both were in line with the Environment Court's decision in this case. We disagree. Neither purports to place an overlay on the statutory language. Both simply apply the statutory criteria to the facts of the case. Mr Fisher also referred to *Calder Stewart Industries Ltd v Christchurch City Council* [2007] NZRMA 163 (EC), in which reference was made to the High Court decision in the present proceedings. We do not see that case as adding anything to the High Court's decision in this case.

[39] Mr Fisher also submitted that the approach urged on us by Coromandel Watchdog ignored the public's reliance on district plans as representing development they can expect to see in the district or region. He relied upon the following statement of Elias CJ in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 at [10] (SC):

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance.

[40] We accept there is validity in Mr Fisher's submission where a council which could have assessed the effects of an activity which was likely to occur in its territory simply chose to give it prohibited activity status to defer the consideration of those effects until a specific proposal came before it. But in other cases, those relying on the plan will be on notice that an activity is prohibited for the life of the plan, subject only to the possibility that the plan may be changed. If the plan change process is activated, it will, of course, afford to the public an opportunity to voice its opinion on the impact of the prohibited activity to the council, which is considering the plan change to permit the activity.

[41] We are satisfied that resort to a dictionary definition of the word "prohibit" was unnecessary in this instance. The Act defines prohibited activity in terms which need no elaboration. It simply means an activity for which a resource consent is not available. We agree with Coromandel Watchdog and the interveners that elaboration

has the potential to limit unduly the circumstances in which the allocation of prohibited activity status may be the most appropriate of the options available under s 77B(7). We therefore conclude that the question for which leave to appeal was granted (see [6] above) must be answered "Yes".

Should we remit the matter to the Environment Court?

[42] The respondents argued that, even if we were to answer the question for which leave to appeal was granted affirmatively, there was no need to refer the matter back to the Environment Court. They said that TCDC had adopted the Environment Court's findings and had undertaken considerable work towards finalising its district plan on the basis of the Environment Court's findings. They argued that, even if we found that the Environment Court had been unduly restrictive in its formulation of the test, this did not call into question its findings in this particular case.

[43] The principal concern raised for consideration by the respondents in the Environment Court was the use of prohibited activity status for mining activities over a very large area of the Coromandel Peninsula, which included a large area of the Hauraki Goldfields containing significant gold and silver resources. As Simon France J noted at [49], the concern was that TCDC appeared to be using prohibited activity classification as:

> [A]n ongoing planning tool, not to prohibit absolutely an activity but to dictate a process for identifying the circumstances in which that activity will be followed. What [TCDC] wishes to do, and has done, is defer decisions about a contemplated activity in an area until there is an application to do it.

[44] As noted at [17] above, the Environment Court found that TCDC was in a position to assess the effects of mining, particularly surface mining, because it had undertaken that exercise for activities which the Environment Court considered had similar effects such as production forestry and quarrying. It considered that TCDC had been inconsistent in its treatment of mining activities.

[45] We agree with the Courts below that, if a local authority has sufficient information to undertake the evaluation of an activity which is to be dealt with in its

district plan at the time the plan is being formulated, it is not an appropriate use of the prohibited activity classification to defer the undertaking of the evaluation required by the Act until a particular application to undertake the activity occurs. That can be contrasted with the precautionary approach, where the local authority forms the view that it has insufficient information about an aspect of an activity, but further information may become available during the term of the plan.

[46] Mr Enright argued that the Environment Court's decision was clearly influenced by its absolutist approach to prohibited activity status, and this Court could not conclude that its decision would have been the same if it had applied the statutory test without the additional gloss. He said the change of approach by TCDC before the Environment Court hearing, and its subsequent acceptance of the Environment Court's decision, did not affect the right of Coromandel Watchdog to seek to uphold the decisions version of the proposed district plan, and Coromandel Watchdog wished to do so in the Environment Court with the benefit of this Court's decision.

[47] Mr Enright said that the Environment Court had, at [33], invited the parties to confer and to revisit the proposed district plan provisions to provide a policy framework to provide for mining, giving effect to the broadly stated views in the Environment Court's decision. He said that this involved an inversion of the required statutory process, because the activity status in terms of s 77B had been determined, with the policies left to be formulated consistently with those classifications. This meant that policies had to be formulated to conform with rules, despite the fact that the statutory process requires rules to be formulated to give effect to policies.

[48] Mr Fisher said this misrepresented what the Environment Court had said, and that, at the high level of abstraction at which, with the agreement of all parties, the Court had dealt with the matter, the Court had undertaken the statutory process. However, that does not entirely meet Mr Enright's point, because it is clear that the Environment Court's decision dealt with the appropriate status classifications, but not with policies, leaving these to TCDC to formulate later.

[49] We are unable to conclude that the Environment Court's decision would be unaffected by the outcome of the present appeal. In those circumstances, it is appropriate to remit the matter to the Environment Court for reconsideration in the light of this decision.

Two other matters

[50] Mr Enright and Mr Casey submitted that the Environment Court had wrongly described the Act as having a "permissive, effects-based philosophy" (at [12]). They said this over-simplified the criteria which local authorities were required to consider when formulating plans, and ignored the fact that plans are an important mechanism by which local authorities and their communities can direct, in a strategic way, the sustainable management of resources. Mr Casey accepted that s 9 was expressed in permissive terms (allowing all land uses other than those contravening a rule in a plan) but contrasted that with the restrictive language of ss 11 – 15. We doubt that the Environment Court was seeking to downplay any aspect of the Act, or to promote the control of effects on the environment to an exclusive status. The labels "permissive" and "effects-based" do not comprehensively describe the sustainable management purpose in s 5 of the Act. The use of those labels should not overshadow the numerous matters that are required to be considered by local authorities when undertaking the processes required by the Act.

[51] There was also criticism of the reference at [15] of the Environment Court's decision to "a given piece of land" (see [4] above). This was said to indicate a requirement for a local authority to make an assessment of the potential effects of a particular activity on a site by site basis, rather than with respect to broad areas and zones as is customary. A site by site evaluation is unnecessary, and we think it is clear from the rest of the Environment Court's decision that there was no intention to impose such a requirement. For example, the table at [31] of the Court's decision refers to policy areas within zones, as the decisions version of the proposed district plan had.

Costs

[52] Coromandel Watchdog is entitled to costs. We award costs of $6,000 plus usual disbursements. Each of the respondents is responsible for half of those costs and disbursements. Any issues relating to costs in the High Court and the Environment Court should be resolved by those courts respectively, in the light of this decision.

Solicitors:
Kensington Swan, Auckland for Appellant
R M Macky, Auckland for First Respondent
Simpson Grierson, Auckland for Second Respondent
Buddle Findlay, Auckland for First Intervener
Auckland Regional Council, Auckland for Second Intervener