IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-896

UNDER	The Resource Management Act 1991
IN THE MATTER OF	an appeal under section 299 of the Act
BETWEEN	UNISON NETWORKS LIMITED Appellant
AND	HASTINGS DISTRICT COUNCIL Respondent

Hearing: 3 September 2007

Appearances: P J Majurey and K K Nathan for the Appellant
M F McClelland for The Outstanding Landscape Preservation Society Inc
J A N Patuawa and E H Toleman for Maungaharuru-Tangitu Society Inc & Ngati Hineuru Iwi Inc
B W Gilmour for the Respondent
M E J McFarlane for the Hawkes Bay Wind Farm Ltd and the HB Rata Society Inc

Judgment: 11 December 2007

JUDGMENT OF POTTER J

In accordance with r 540(4) High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 11.30 a.m. on 11 December 2007.

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Introduction

[1] The appellant Unison Networks Limited was granted resource consents by the Hastings District Council to construct and operate a wind farm comprising 37 turbines to the south and west of the feature known as Te Waka, about 2 kilometres south of Titiokura Saddle, between Te Pohue to the east and the Mohaka River to the west ("the proposal").

[2] The Outstanding Preservation Society Inc ("OLPS"), Maungaharuru-Tangitu Society Inc and Ngati Hineuru Iwi Inc ("the Tangata Whenua") and Hawkes Bay Wind Farm Limited appealed to the Environment Court. In its decision dated 13 April 2007 ("the decision") the Environment Court allowed the appeal determining that the proposal did not promote the sustainable management of natural and physical resources as that phrase is explained in s 5 of the Resource Management Act 1991 ("the Act").

[3] Unison says the Environment Court erred in law. It states the questions of law to be decided on appeal as:

a) Whether the Environment Court erred in law by:

Outstanding Landscape

(a) Finding:

(i) the area of the proposal is an outstanding natural landscape; and

(ii) there would be significant adverse effects on such landscape

in circumstances where the recently operative district plan contains no such classification.

Reduced proposal

(b) Finding it was not open to the Court to approve a reduced proposal on the evidence.

[4] The issues on appeal are thus narrowly focused.

Parties' positions

[5] Unison seeks that the appeal be allowed and the matter be referred back to the Environment Court for reconsideration in light of the findings of this Court, and that the Environment Court be directed to hear further evidence to the extent necessary to enable proper consideration of the issues in light of the findings of this Court.

[6] The respondent Council abides the decision of this Court but Mr Gilmour reserved leave to address the Court on matters arising during the hearing. He made submissions in regard to the processes undertaken by the Council towards the District Plan becoming operative in June 2003.

[7] OLPS and the Tangata Whenua oppose the appeal and were heard in opposition.

[8] Hawkes Bay Wind Farm Ltd and HB Rata Society Inc support the positions taken by OLPS and the Tangata Whenua but otherwise abide the decision of the Court. Mr McFarlane briefly addressed the Court on their behalf.

Background

[9] Two prior decisions of the Environment Court are relevant to this appeal.

[10] On 17 July 2006 the Environment Court confirmed separate decisions by the Council to grant land use consents for two neighbouring wind farms. Those

consents were granted to Hawkes Bay Wind Farm Ltd for 75 (130 metre) turbines and to Unison Titiokura (Stage 1) for 15 (130 metre) turbines ("the first decision").

[11] The Unison Titiokura wind farm is to be built on the Titiokura Saddle between the Te Waka range (to the south) and the Maungaharuru Range to the north, immediately to the north of State Highway 5 (the Napier-Taupo Road) in northern Hawkes Bay. It is Stage 1 of a two-stage project, the proposal for Stage 2 being the subject of the Environment Court decision of 13 April 2007, which is the decision under appeal.

[12] The Hawkes Bay Wind Farm Ltd project is also to be mostly situated on the northern side of State Highway 5 with only five of the proposed 75 turbines to be on the southern side of State Highway 5.

The Hastings District Plan

[13] The Plan was made operative under the Act in June 2003.

[14] It is common ground that Unison's Stage 2 proposal is a non-complying activity under the Plan.

[15] It is also common ground that the area designated under the Plan as ONF7 (outstanding natural feature 7) does not encompass the area of the Unison Stage 2 proposal. The nearest wind turbine is proposed to be some 6.4 kilometres from ONF7, separated from it by State Highway 5. ONF7 does not include the Titiokura Saddle – Te Waka Range. Although these areas were included in the proposed definition of ONF7 they were deleted before the Plan became operative. However, in Appendix 12.2-1 of the Plan headed *Outstanding Natural Features and Landscapes*, ONF7 is incorrectly described as Maungaharuru Range – Titiokura Saddle – Te Waka Range. The relevant planning map correctly identifies the area of ONF7, i.e. exclusive of Titiokura Saddle – Te Waka Range.

[16] In relation to ONF7 the decision states at [23]:

> But the description of ONF7 is misleading – it does not in fact cover the area described. As depicted on the Planning Maps (which reflect the Council's decisions following submissions on the Plan) it falls well short of Te Waka itself, and further short still of the Stage 2 proposed turbines. Had the ONF remained as originally proposed, it would have encompassed the northern-most 11 proposed turbines. So, strictly, the Rules that apply to ONF7 are really of no more than academic interest, but that is not to say that the topic of Outstanding Natural Landscape is irrelevant. It is not, and we shall return to it.

[17] Ms Putuawa, counsel for the Tangata Whenua did not seek to labour arguments addressed to the Environment Court that the area subject to the Stage 2 proposal is within ONF7 in the District Plan, based on an "ambiguity" in the Plan arising from the difference between the description in Appendix 12.2.1 and the designation on the relevant map. Rather, she submitted that the Environment Court was correct to consider the proposal in an holistic manner having regard to both ONF7 (despite the ambiguity) and the landscape generally as outstanding and subject to the considerations in Part 2 of the Act.

Resource Management Act – relevant provisions

[18] Section 104D prescribes particular restrictions for non-complying activities. A consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either:

a) The adverse effects of the activity on the environment will be minor; or

b) The application is for an activity that will not be contrary to the objectives and policies of the relevant district plan.

[19] The Environment Court in this case was clear that Unison's Stage 2 proposal did not fall within sub-paragraph a) but was satisfied that the activity would not be contrary to the objectives and policies of the Hastings District Plan.

[20] The Environment Court then turned to consider the application under s 104. Section 104 is at the heart of this appeal. It relevantly provides:

Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, *subject to Part 2*, have regard to -

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of –

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonable necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.

(emphasis provided).

[21] The Environment Court stated in the decision, and there is no dispute, that sub-paragraphs (b)(i), (ii) and (iii) have no application in this case. Sub-paragraph (b)(iv) is, however, important as is the application of Part 2.

[22] Part 2 sets out the **Purpose and principles** of the Act. Section 5 provides:

Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[23] Section 6 relevantly provides:

> **Matters of national importance**
>
> In achieving the purposes of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) …
>
> (d) …
>
> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
>
> (f) …
>
> (g) …

Environment Court decision

[24] The Environment Court's decision dated 13 April 2007 records that the proposal is Stage 2 of Unison's total project.

[25] Stage 2 is described as comprising 37 turbines which indicatively will be Vestas 90 machines having 85m towers, with the rotor blade vertical of about 130 metres. Stage 2 includes about 20 kilometres of access roading, meterological masts and, during construction, a concrete batching plant. Earthworks could be in the order of 450,000 cubic metres.

[26] The site is described in the decision as follows:

> Te Waka is a very distinctive landform. From a point close to the Titiokura Saddle it runs south along the ridgeline, and the skyline, for nearly 2kms. From any distance, particularly from the east, that piece of the ridgeline appears flat and straight. It has no structures or high vegetation on it. For reasons to become apparent later, this is the *hull* of the Waka. The landform

> then rises in a steep curve for 100m – this is the *sternpost* of the Waka. At the peak of the sternpost is a 30m distinctly visible Telecom communications tower. Beside it is a shorter and much slimmer Vodafone communications mast which is much less visible, certainly from a distance. Running away from the sternpost is another ridgeline which is also relatively straight and flat, although not as distinctively so as the *hull*. Some witnesses referred to this as the *wake* of the Waka. This is all high ground, forming the northwestern skyline of Hawkes Bay. It is readily visible from many points in and around the rural areas to its south and east, from many points around Napier, and as far south as Havelock North. From the west, it is visible from points beyond the Mohaka River. The Titiokura Saddle is 762m asl – but the sternpost of Te Waka rises to 1021m.

[27] The decision then records that the proposal does not include any turbines or other infrastructure on the feature of Te Waka itself. The turbines closest to the peak of the sternpost, to the south and to the west, will be in the order of 400 metres from it. There is proposed to be a line of ten turbines running south along or close to the "wake" ridgeline, another line of eight turbines about 800 metres to the west at about the same elevation as the "wake" ridgeline with three further turbines on spurs to the east of it. The balance of the turbines are to be on three separate and descending ridges about 1.8 kilometres south of the line carrying the eight turbines. In total from the peak of the sternpost to the southern most turbine, the project will extend over a length of about 4.5 kilometres.

[28] The Court considered the application of s 104D and while stating at [14]:

> … we cannot possibly agree with the witnesses who hold that the adverse effects on landscape and visual amenity of this proposal will not be more than minor …

the Court was satisfied that the proposal was not contrary to the objectives and policies of the Hastings District plan. The proposal thus passed one of the s 104D thresholds or gateways, and the Court turned to consider it under s 104 and Part 2 of the Act.

[29] Under "Positive effects" the Court noted that the proposed 37 wind turbines, each with a capacity of 3MW making a total generating capacity of 111MW, would create annual generation of an anticipated 405Gwh. That is enough electricity for 50,000 households or about 150,000 people. The proposed output from the wind farm would contribute about 1% of the annual national electricity demand and some

65% of the annual growth in demand for electricity. With the two consented wind farms, Unison Stage 1 and Hawkes Bay Wind Farm Ltd, the generation would be sufficient for the demands of up to 500,000 people, not including any industrial or commercial demand.

[30] The Court concluded that the proposal was significant on a national scale. The Court summarised under this head:

> … clearly the project would use the renewable natural resource of the wind in a way that enables the community to supply itself and its future generations with electricity for its social and economic wellbeing and for its health and safety.

[31] The Court then considered adverse effects under the heading "Archaeological and Palaeobiological", "Landscape and Visual", "Landscape Effects" and "Cumulative effects".

[32] In relation to "Cumulative effects" the Court referred to the definition in s 3 of the Act and in particular sub-paragraph (d):

> … any cumulative effect which arises over time or in combination with other effects – regardless of the scale, intensity, duration or frequency of the effect.

[33] The Court said at [52] and [53]:

> … If a consent authority could never refuse consent on the basis that the current proposal is … *the straw that will break the camel's back*, sustainable management is immediately imperiled. It is to be remembered that all else in the Act is subservient to, and a means to, that overarching purpose.
>
> Logically, it is an unavoidable conclusion that what must be considered is the impact of any adverse effects of the proposal on … *the environment*.

[34] Having considered the evidence of three experts on the cumulative, visual and landscape effects, the Court found at [61]:

> In short, we prefer the evidence of Mr Lister and Ms Lucas to that of Mr Evans. We do not consider that turbines at either end of the Waka would frame it, as suggested by counsel for Unison. We conclude that the proposed windfarm would have significant adverse visual and landscape effects, both individually (if built first, or by itself) and cumulatively with the other two consented windfarms.

[35] The Court then dealt extensively with the concerns of Maori under ss 8, 7(a) and 6(e) of the Act in [68] to [84] of the decision. The Court stated at [81]:

> … the area of Te Waka – Maungaharuru has all of the features mentioned in s 6(3) - … *land, water sites, waahi tapu and other taonga*. It was impossible not to absorb some of the depth of emotion expressed in the evidence about the attachment of the people to this area. It not only defines one of the boundaries of their tribal rohe, or districts. It also helps define them as individuals and as tribal and family groups. The relationship they have with it, despite no longer owning it, must be, we think, just the kind of relationship … *of Maori, their culture and traditions* … that the drafters of the section had in mind, and which the legislation requires to be recognised and provided for as being of national importance.

[36] The Court referred to the issue of waahi tapu and summarised at [85]:

> The issues raised under these provisions are powerful, but not of themselves necessarily decisive. As do all factors arising under sections 6, 7 and 8, they inform the overall decision to be made under s 5 – whether the proposal promotes *sustainable management*.

[37] The Court dealt with other matters in terms of s 7 of the Act and concluded with an evaluation of those factors at [102]:

> The factors of kaitiakitanga, stewardship, the maintenance of landscape and visual amenity values and the quality of the environment in our view lean towards preserving this landscape, particularly when the adverse effects of this proposal are considered cumulatively with the other consented windfarms. The ecology factor is largely neutral. The factors of effects of climate change, and the benefits of the use of renewable energy will, as almost always, fall on the side of operating a windfarm.

[38] The Court then turned to consideration of s 6 factors and, noting that it had already dealt with s 6(e) under the concerns of Maori, it turned to consider s 6(b), *the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.*

[39] The Court said the first issue to resolve was whether this is *an outstanding … landscape*. It noted that *landscape* comprises more than the purely visual, and encompasses the ways in which individuals and the communities they are part of perceive the natural and physical resources in question and that those perceptions can be coloured by … *social, economic, aesthetic and cultural conditions*: *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (ENC).

[40] After an analysis of the competing views of three expert witnesses the Court concluded at [108]:

> … the area identified in the original *Isthmus* report (and in the Proposed District Plan as notified) as ONF7 is an outstanding natural feature or landscape …

[41] The Court referred briefly to argument advanced by Unison's counsel seeking to distinguish the decision in *Chance Bay Marine Farms Ltd v Marlborough District Council* cited as [2000] NZRMA 3 (ENC), which was the subject of considerable submission on appeal and to which I shall turn later in this judgment, and at [111] under the heading "Evaluation of s 6 factors" the Court concluded:

> There is no doubt that this is an *outstanding* landscape. We have a clear view that the adverse effects of the proposal on this landscape, particularly considered as cumulative on what has been given consent, would be such that the development would be *inappropriate*. The proposal's effects, both alone and cumulatively, on Maori and their relationships with their maunga and its values are also against the proposal.

[42] The Court at [112] to [114] considered the Council's decision which granted the resource consents on the Stage 2 application. (Section 290A of the Act requires the Environment Court in determining any appeal or inquiry to have regard to the decision that is the subject of the appeal or inquiry). As to the major issue of landscape and visual effects, the Court agreed with the Council's determination that this is an outstanding landscape, but disagreed that the effects of the turbines on the landscape would be no more than minor.

[43] The Court concluded on this aspect at [114]:

> For the reasons we have outlined we disagree with the Council's assessment of the degree of adverse effects. That is not a criticism of its decision making process; the evidence we had put before us was significantly more fulsome and detailed on those issues.

[44] It also expressed concern that the Council had been somewhat dismissive of the cultural impact evidence in relation to Maori concerns and that there was no acknowledgement of the value Maori place on the skyline of the Maunga as a whole. The court stated that the concerns of Maori about the proposal was the other major issue.

[45] The Court then returned to a consideration of the s 5 purpose:

> … to promote the sustainable management of natural and physical resources.

[46] It referred to the earlier decision on the Unison Stage 1 and Hawkes Bay Wind Farm Limited proposals when it expressed the view that for those sites the balance fell on the side of use of the land for electricity generation from renewable resources notwithstanding the adverse effects. It noted it had specifically made that decision on a site-specific basis and had stated that it might well be that other sites would call for a different result. The Court concluded at [116]:

> Important as the issues of climate change and the use of renewable sources of energy unquestionably are, they cannot dominate all other values. The adverse effects of the proposal on what is undoubtedly an outstanding landscape, and its adverse effects on the relationship of Maori with this land and the values it has for them, clearly bring us to the conclusion that the tipping point in favour of other values has been reached. When those adverse effects are considered as cumulative upon the Stage 1/HBWF effects, the conclusion is the more profound. In the terms of s 5, the proposal would help enable people and communities to provide for their economic wellbeing and their health and safety, and would help sustain the potential of natural and physical resources, in the context of power generation from renewable sources. But it would not help people and communities provide for their cultural, and possibly social, wellbeing. Nor would it sustain the landscape, visual and cultural amenity resource for future generations. It also would fall well short of avoiding, remedying or mitigating adverse effects on the environment.

[47] Finally the Court considered the possibility of declining part of the proposal. It noted, however, that the proposal was for the layout of 37 turbines and that was what the evidence related to. It declined "to embark on a major redesign of the project".

Role of Court on appeal

[48] The appeal is brought under s 299 of the Act which limits appeals to a question of law.

[49] This Court will interfere with decisions under appeal only if it considers the Tribunal/Court appealed from:

- applied the wrong legal test; or

- came to a conclusion without evidence or one to which, on the evidence it could not reasonably have come; or

- took into account matters which it should not have taken into account; or

- failed to take into account matters which it should have taken into account: *Countdown Properties (Northland) Limited v Dunedin City Council* [1994] NZRMA 145, 153 (HC).

[50] The Tribunal/Court should be given some latitude in reaching findings of fact within its areas of expertise: *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353. Any error of law must materially affect the result of the Tribunal's/Court's decision before this Court should grant relief: *Royal Forest & Bird Society Inc v W A Habgood Limited* (1987) 12 NZTPA 76, 81-82.

"Outstanding landscape" finding – an error of law?

Unison's submissions

[51] The central submission of the appellant was that the area of the Stage 2 proposal is not an Outstanding Natural Feature as defined in the District Plan, and that in the exercise of the discretion conferred by s 104, the Environment Court is bound to observe the relevant provisions of a District Plan when a full analysis under Part 2 of the Act has been undertaken by the Council in the processes of development of the Plan. In those circumstances, Mr Majurey submitted, the requirement of the Court under s 104 to "… have regard to -" a District Plan means, "must observe the Plan".

[52] Counsel referred to the full process undertaken pursuant to the Act in development of the Hastings District Plan including notification; receipt of submissions including objections to the proposed ONF7; notification of submissions received; opportunity provided for further submissions in relation to submissions

received; planning report prepared by staff; hearing conducted by the Council; reasoned decision of Council following the hearing particularly in relation to the reduction of the designated area of ONF7 (referred to by the Environment Court in the decision at [109]); and a reference to the Environment Court (which did not relate to the determination regarding the extent of ONF7).

[53] It was submitted that the extensive submission and scrutiny process undertaken by the Council in development of the Plan prior to its being made operative under the Act in June 2003 gave effect to the requirements of s 6 of the Act.

[54] Reliance was placed on the decision of the Environment Court in *Gannet Beach Adventures Ltd v Hastings District Council* [2005] NZRMA 311 where two of the three members of the Court were the same as comprised the Court in the decision under appeal, and the area designated ONF5 was in issue. A resource consent had been granted by the Council for the construction and operation of a high-end tourist lodge on the property known as Cape Kidnappers Station. The Court allowed an appeal against the grant of the resource consent. In that case the Court determined that the proposal could not pass either threshold in s 104D so that a resource consent could not be granted, but went on to observe that it would not have granted a consent after considering s 104 (including Part 2) factors. The Court stated at [26]:

> The outstanding natural feature (ONF) overlay has been adopted by the Council as the mechanism to give effect to the requirements of s 6 RMA – the requirement to recognise and provide for, as matters of national importance, the preservation and protection of the features and values set out in the section.

[55] At [93] the Court referred to the extensive submission and scrutiny process through which the plan once drafted, underwent:

> It seeks to protect that very landform from inappropriate development, and itself goes some way towards defining what might be inappropriate through the controls imposed on the ONF5 area.

[56] The Court concluded at [99]:

> … if a development of this scale, even with its clever design, was given consent there would inevitably be a major question mark over the Plan's

> ability to control the effects of inappropriate developments in the ONF areas generally.

[57] It was submitted that given the recognition and respect accorded by the Environment Court in the *Gannet Beach* decision, to the extensive submission and scrutiny process in the development of the plan, it is not logical or rational for the Court to say in this case that the s 6(b) considerations have not likewise been reflected in the Council processes in determining ONF7. Here, the Environment Court was dealing with exactly the same considerations as the Council, in determining whether the area in issue is an outstanding natural landscape. It was dealing with exactly the area which had been subjected by Council to the full processes required by the Act in development of the plan, which are designed to give effect to the criteria in Part 2.

[58] The appellant submitted that the Court was clearly attracted to the designation of ONF7 as originally proposed but it was not for the Court to substitute its view of what comprises an outstanding natural landscape for that of the Council determined after full process and decision.

[59] It was submitted that "modern" superior court authorities have clearly determined that operative district plans have legislative effect. This was said to be reflected in *Discount Brands Ltd v Westfield (New Zealand) Limited* [2005] 2 NZLR 597 where Elias CJ said at [10]:

> 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. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[60] Also in *Matukituki Trust v Queenstown Lakes District Council* HC CHCH CIV 2006-412-00733 19 December 2006, where Fogarty J said at [80]:

> When exercising s 104 powers in respect of discretionary activities governed by operative provisions of a plan, the plan itself can dictate what are adverse effects for the purposes of the RMA. I have already discussed this earlier in

> the judgment. It needs to be kept in mind that an operative plan is the product of Part 2 analysis and is beyond challenge.

[61] Accordingly, Mr Majurey submitted, operative district plans can define the extent of the s 104 inquiry. He submitted that the community is entitled to rely on the final form of ONF7 in the operative plan (it having legislative status), and that Unison did place reliance on the operative plan in proposing a significant renewable energy project.

[62] Counsel submitted that the Environment Court side-stepped or by-passed the operative plan and effectively substituted its own ONF standard by reinstating the pre-hearing (notified) version of ONF7. It was submitted that the Court had no such warrant under the Act and fell into error by displacing and not applying lawful regulation. It did this, counsel submitted, by attempting to avoid the obvious difficulty presented by the clear terms of the operative plan by resorting to the "evidence of the landscape witnesses", when the Court stated at [109]:

> … it is appropriate that we consider, in the light of the evidence of the landscape witnesses, the importance of the natural landscape that would be significantly adversely affected by the windfarm. We should consider also effects on people in the region who live in the Napier City and outside Hastings District.

[63] It was submitted that such evidence cannot and does not determine nor trump the lawful implementation of the Act by Council and that the operative plan sets the bounds for the s 6(b) inquiry. The Court had to assess the landscape evidence through the lens of the plan.

[64] The appellant was also critical that the Environment Court "did not engage" with the submission made to it by counsel for Unison, that the decision of this Court in *Chance Bay Marine Farms Ltd v Marlborough District Council* HC WN AP210/99, 15 March 2000, is not relevant authority in this case. This submission relied on the fact that the Marlborough District Plan under consideration in that case was a proposed plan, while in this case the Hastings District plan is operative.

The Tangata Whenua's submissions

[65] Ms Patuawa for the Tangata Whenua, supported by Mr McClelland for OLPS, submitted that the Environment Court was entitled to make a finding that the landscape the subject of Unison's Stage 2 proposal, is outstanding.

[66] Counsel started from the common ground that Unison's proposal was "non-complying" in terms of the Hastings District Plan. The Environment Court accordingly was required to look at whether the proposal could pass one of the two threshold tests in s 104D and having done so the Court was then able to move to consideration of the consent application under s 104. Pursuant to s 104 the Court, acting as the consent authority, was required to have regard to the effects of the proposal on the environment (under s 104(1)(a)) and any relevant provisions of the District Plan (under s 104(1)(b)(iv)). However, these considerations were required to be *subject to* the matters set out in Part 2. It was submitted that these considerations in themselves answered the appellant's submission.

Discussion

[67] I consider Ms Patuawa's submission has merit. The requirement of the Environment Court acting as the consent authority under s 104, is that it should have regard to the actual and potential effects on the environment of allowing the activity, and also that it should have regard to the District Plan. But, in having regard to those matters, the Court must consider the application "subject to Part 2". The interpretation of s 104 advanced by Unison, would place above other relevant considerations the provisions of the District Plan. This would render superfluous the requirements of s 104 that the Court have regard to the actual and potential effects on the environment and importantly that the considerations must be subject to Part 2.

[68] I do not consider as a matter of statutory interpretation, that the requirement of s 104 to "… have regard to", can possibly carry the primacy for which the appellant contends in respect of the relevant provisions of the District Plan. This is only one of the considerations under (b) to which the Court must have regard

(although it is accepted that it is the only applicable relevant provision under (b) in this case), and it is a matter to which the Court must have regard along with the matters specified in (a) – actual and potential effects on the environment of allowing the activity – and any other matter the consent authority considers relevant and reasonably necessary to determine the application under (c). All such factors are subject to Part 2.

[69] The phrase "must have regard to" in s 104(1) was considered in *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481 (HC). John Hansen J in the High Court heard an appeal from the Environment Court, where one of the grounds of appeal was that the Environment Court had erred in giving little weight to both the transitional and the proposed District Plans of the Christchurch City Council and had failed in its statutory obligation to have regard to those plans, contrary to s 104 (then expressed as "shall have regard to").

[70] Hansen J canvassed various cases where the term "shall have regard to" has been considered, in different contexts. The phrase is not synonymous with "shall take into account"; all or any of the appropriate matters may be rejected or given such weight as the case suggests is suitable: *R v CD* [1976] 1 NZLR 436. Nor is the phrase synonymous with "give effect to", so that such matters for consideration may be rejected or accepted only in part, provided they are not rebuffed at outset by a closed mind so as to make the statutory process some idle exercise: *New Zealand Fishing Association v Ministry of Agriculture & Fisheries* [1988] 1 NZLR 544. The matters must be given genuine attention and thought, and such weight as is considered to be appropriate, but the decision maker is entitled to conclude that the matter is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function: *New Zealand Co-operative Dairy Company Ltd v Commerce Commission* [1992] 1 NZLR 601. Hansen J considered that the term "shall have regard to" should not be given any different meaning as it was given in those cases, and that the appellant was seeking to elevate the term from "shall have regard to" to "shall give effect to". The requirement for the decision maker is to give genuine attention and thought to the matters set out in s 104 but they must not necessarily be accepted.

[71] It is also relevant to observe that s 290A which was inserted in the Act in 2005 requires that the Environment Court in determining an appeal or inquiry:

> … must have regard to the decision that is the subject of the appeal or inquiry.

[72] Section 290A is a specific requirement of the Environment Court on appeal, when acting under the broad powers given by s 290, by which the Court has the same power, duty and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. It would be nonsense to suggest that the requirement in s 290A to "have regard to" the decision appealed against, means that the Environment Court must observe or give effect to that decision. Similarly I consider when the same expression, "have regard to", is used in s 104, in the context of that section it cannot be the legislative intention that any one of the provisions of (b) should trump the other provisions of s 104. On the contrary, the provisions of (a), (b) and (c) are made subject to Part 2 which brings into play the overriding purpose and principles of the Act.

[73] Mr McClelland submitted that if the Environment Court was to be bound by the District Plan it would be prevented from doing justice to s 6 even if all the evidence adduced before it was that the relevant provisions of the Plan were wrong. He submitted that Fogarty J put the position "in a nutshell" at [79] of his judgment in *Wilson v Selwyn District Council* [2005] NZRMA 76:

> Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part II, to have regard to it, "shall have regard". The qualifier "subject to Part II", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose or one or more of the provisions in Part II, in the context of the application for this resource consent.

(The decision in *Wilson* on the essential issue in that case, namely the meaning of "the environment" under s 104, was reversed by the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA), but the observations at [79] in *Wilson* were not criticised). Fogarty J in reaching that conclusion, nonetheless recognised that plans have only been brought into being by a Part 2 analysis which will inevitably have examined the impact of activities on the environment.

[74] I agree that the analysis of Fogarty J helpfully and accurately states the manner in which a consent authority acting under s 104 should approach its consideration of a particular application.

[75] In this case the Court was considering a specific proposal, namely Unison's Stage 2 proposal. It was required to assess that proposal in terms of s 104 giving primacy to the purpose and relevant principles in Part 2.

[76] The purpose of the Act stated in s 5 is to promote the sustainable management of natural and physical resources. Section 6 requires all persons exercising functions and powers under the Act to recognise and provide for matters of national importance. They include in s 6(b) the protection of outstanding natural features and landscapes from inappropriate subdivision use and development (refer [22] and [23] above).

[77] The priority of the Part 2 considerations in the context of s 104 is made clear because the matters to which the Court must have regard are made expressly subject to Part 2. This priority position for Part 2 was accorded by a 1993 amendment to the Act, as confirmed and applied in the decision in *Reith v Ashburton District Council* [1994] NZRMA 241 (PT).

[78] This is the process the Court undertook. It looked generally at the positive and adverse effects of the proposal, it dealt briefly with the proposed regional policy statement, it looked specifically at the Part 2 matters which the proposal raised and the adverse and positive effects in terms of those.

[79] In relation to its consideration of s 6(b) matters, the Court had regard to extensive expert evidence on the landscape in question and undertook an analysis to assess the significance of the landscape applying the principles in *Pigeon Bay Aquaculture Ltd v Canterbury RC* [1999] NZRMA 209 (ENC) as developed in *Waikatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (ENC).

[80] Applying those factors the Court reached the conclusion that the area the subject of the proposal was an "outstanding landscape" in terms of s 6. It then concluded that the adverse effects of the Unison Stage 2 proposal on this outstanding landscape would be inappropriate.

[81] The Court had appropriate regard to the provisions of the District Plan at [16] to [28] of the decision, but quite properly made its own judgment on the Part 2 matters in issue and did not in its reasoning subordinate these issues to the provisions of the District Plan. It would have been wrong to do so. The Court was entitled to, and properly did make its own judgment based on the evidence it heard, that the area subject to the Stage 2 proposal was an outstanding natural landscape.

[82] Importantly, the decision of the Environment Court considered extensively the interests of the Tangata Whenua and the effects of the proposal on them. The Court identified the two major issues as the landscape and visual effects and the concerns of Maori about the proposal. Thus the Court's decision was not based solely upon its finding of fact that the area of the Unison Stage 2 proposal was an outstanding landscape, but took into account in the balancing exercise it was required to undertake, the adverse effects on the Tangata Whenua. It then determined that the cumulative effects of the Stage 2 proposal upon the Stage 1/HBWF effects together with the adverse effects "on what is undoubtedly an outstanding landscape", and the adverse effects for Maori on their relationship with the land, led to a conclusion that "… is the more profound" (refer [46] above).

Discussion on authorities

[83] I return to *Chance Bay Marine Farms Ltd v Marlborough District Council* which the appellant submitted should be distinguished because in that case the Environment Court was concerned with a proposed plan of the Marlborough District Council, whereas in this case the Hastings District Plan is operative.

[84] The Marlborough District Council had determined that a mussel farm would be a prohibited activity under its proposed Plan. The Environment Court upheld the Council's determination. At [159] of its decision the Court said:

> Regardless of the provisions of the proposed plan which do not identify the Chance Bay landscape as outstanding, it is still open to the Court to make this finding as one of fact, which we do. If the adverse effects of a marine farm on this landscape are such as we have indicated, it should be avoided altogether – and not allowed to remain because other marine farms cannot locate there to cause adverse cumulative effects.

[85] On appeal to this Court (AP210/99 HC WN 15 March 2000), in response to a submission of the appellant that the Environment Court exceeded its jurisdiction in making that decision, Doogue J said at [27] of his judgment:

> … the Court was fully entitled to take into account that Chance Bay contained outstanding landscape. That issue was raised by the appellant's reference. The Court, like the respondent, was untrammelled in taking that aspect of the matter into account, notwithstanding the decisions of the respondent in relation to the classification of areas of outstanding landscape character for the purposes of resource consent applications.

[86] This Court upheld the ability of the Environment Court to make a finding of fact that the Chance Bay landscape was outstanding notwithstanding that it was not so classified by the Proposed Plan of the Marlborough District Council.

[87] I do not consider the basis for distinguishing *Chance Bay* advanced by Unison – that the area of outstanding natural landscape was defined in a proposed rather than operative plan – has any substance. This Court placed no significance on the designation being in a *proposed* plan. Rather, it observed at [23] that the outstanding natural landscape identification was an indication to parties seeking resource consents, but resource consents were not in issue before the Marlborough District Council or the Environment Court. In issue was a prohibited activity, mussel farming, which required the Council and the Environment Court to focus on s 5 and s 6 matters including whether the area was an outstanding natural landscape under s 6.

[88] In this case, because the Unison Stage 2 proposal is a non-complying activity the Council and the Environment Court had to assess it in terms of the s 104D threshold, and that passed, had then to focus on s 5 and s 6 matters including the protection of outstanding natural features and landscapes pursuant to s 6(b), "having regard to" any actual or potential effects on the environment of allowing the activity, and "a plan or proposed plan" (under s 104(b)(iv)).

[89] It is to be noted that the "regard" required by s 104(1) applies equally to a plan or proposed plan. Neither is given primacy.

[90] While I accept that in the decision the Environment Court did little more than refer to the submission of Unison's counsel in relation to *Chance Bay*, a more extensive analysis would not have impacted on the Court's reasoning.

[91] Counsel for Unison cited passages from two cases in support of the submission that the Environment Court had somehow "side-stepped" or "by-passed" its obligation to observe the provisions of the District Plan. Reliance was placed on the description in the *Discount Brands* case referred to at [59] above that the District Plan has "legislative status" and in *Matukituki* referred to at [60] above that the operative plan is the product of Part 2 analysis and is "beyond challenge".

[92] I do not consider that either of these judgments or the passages cited from them support Unison's contention that the Environment Court was bound to observe the designation in the Plan. There is no dispute that the Court was required to have regard to the District Plan under s 104(b)(iv). This the Environment Court did. But the Environment Court went on to consider, as it was required to do by s 104, the specific proposal, that of Unison for its Stage 2 project, under the Part 2 purpose and principles. In that context the Court has the power under s 104 to find that a landscape is an outstanding natural feature in terms of s 6(b). Such a finding made under s 104 in relation to a specific application does not contradict the District Plan.

[93] In *Discount Brands* the Court was concerned with a decision by the Council not to notify an application for a resource consent. The Supreme Court held that the application should have been notified as the Council could not have satisfied themselves on the available evidence that the effects of the proposal would be minor without the opportunity for input from persons adversely affected.

[94] Elias J at [8] and [9] referred to the relevant wide-ranging matters required to be taken into account under s 104(1). She said:

> These criteria had to be applied in the context of the wider Act.

[95] That was the process the Environment Court properly undertook in this case, having regard to the District Plan but reaching its own conclusion pursuant to s 6 on the basis of the evidence it heard and all other relevant considerations, as to whether the area of the proposal was an outstanding landscape.

[96] *Matukituki* was principally concerned with whether the proposal in issue should have been considered and analysed under the Transitional District Plan ("TDP") or the Partially Operative District Plan ("PODP") of the District Council. The High Court found that in terms of the PODP, which it said in a substantive sense had eclipsed the TDP, the proposal was a discretionary activity and therefore had to have been considered under s 104 rather than under s 104D which would have applied to a non-complying activity.

[97] The passage relied on by Unison at [60] above is in the context of which plan should have been considered and whether the test under s 104D or s 104 should have been applied to the proposal.

[98] The Court went on to observe in *Matukituki* at [81], that in the case of an application for a non-complying activity there will be no rules under the operative scheme that govern approval of the activity. That was the situation in this case where Unison's proposal relates to a non-complying activity. Thus there were no rules to guide the Court in making an assessment of the actual and potential effects on the environment under s 104. This is in contrast to a discretionary activity which was the situation in *Matukituki* if the PODP governed the proposal, which the Court held it did.

[99] Again this decision is not in conflict with the approach taken by the Environment Court in this case. The District Plan was not disregarded. Regard was had to it by the Environment Court in the assessment and analysis of Unison's proposal which was a non-complying activity.

[100] Finally I refer to the *Gannet Beach* case about which Unison made strong submissions (refer [54] to [57]) above.

[101] In that case the Court held that the proposal could not pass either threshold in s 104D so at that point the application had to fail. The observations on the application of s 104 were therefore obiter. They indicated the Court's view in that particular case, which recognised the protection intended and provided by the ONF5 designated area. The Court's reference to the extensive submission and scrutiny process undergone before the District Plan was made operative, of course is a process that is required by the Act of Councils in relation to their District Plans. For the reasons already given, neither the fact of that process having been duly undertaken, nor the end designation of a particular area in a District Plan, circumscribes the proper exercise of the broad discretion of the Environment Court under s 104 (including Part 2 factors), beyond the requirement of s 104 to have regard to the Plan.

Conclusion

[102] I conclude therefore that the Environment Court did not err in law in making a finding of fact that the area of the Unison Stage 2 proposal is an outstanding natural landscape and that there would be significant adverse effects on such landscape, in circumstances where the Hastings District Plan includes the classification ONF7 which does not apply to the area the subject of the proposal. Findings of fact may not be challenged: *Stark v Auckland Regional Council* [1994] NZRMA 337 (HC).

Reduced proposal

[103] Unison contends that the Environment Court erred in law in finding the Court was not able to approve a "reduced proposal" when such a finding was available on the evidence.

[104] The Court held at [117]:

> We considered the possibility of declining part of the proposal – those turbines within the equivalent of the length of the Waka (i.e. roughly 1.8 km) south of the Waka sternpost (see para [49]). But the proposal is for the layout of 37 turbines and that is what the evidence related to. We have no

> evidence as to the effects of a major change on the viability, layout and practicability of what would remain of the project, or whether a more extensive project extending to the south might be preferred by the applicants. Nor do we have evidence about the acceptability of the different landscape, cultural and other effects from such an altered proposal. While relocating some turbines or even eliminating a few might fall within the ambit of this hearing it is not open for us to embark upon a major redesign of the project. Redesign of the project would need to be undertaken by Unison and fresh applications made.

[105] The Court did not decide that it was not open to it to approve a reduced proposal. Rather it held that the proposal before it was for 37 turbines, which was the proposal addressed in evidence. The Court did not consider it had before it the evidence to determine an altered or reduced proposal, and that it was not open for it to embark upon a major redesign of the project.

[106] That conclusion was clearly open to the Court. The Court was not presented with a reduced proposal by Unison. The proposal had focused on 37 turbines and that was the proposal the evidence addressed. The Court simply considered and rejected a modified proposal on the basis that there was insufficient evidence for it to determine a reduced proposal.

Result

[107] The appeal is dismissed.

Costs

[108] The parties did not address the issue of costs. I consider that the appropriate costs categorisation is 2B. I anticipate that the parties should be able to settle costs on the basis that the appellant has been unsuccessful and should meet the costs and proper disbursements of the other parties to the appeal. If not, leave is reserved to any party to apply by Friday 25 January 2008.