IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV 2012-454-49
[2012] NZHC 1272

UNDER	the Resource Management Act 1991
BETWEEN	PROPERTY RIGHTS IN NEW ZEALAND INCORPORATED Appellant
AND	MANAWATU-WANGANUI REGIONAL COUNCIL Respondent

Hearing: 24 April 2012

Counsel: M W Plowman with P J Chumun for Appellant
J W Maassen for Respondent
P R Gardner for Federated Farmers of New Zealand

Judgment: 8 June 2012

JUDGMENT OF THE HON JUSTICE KÓS

Introduction

[1] Do regional councils have statutory authority to make rules to control land use for the purpose of maintaining indigenous biological diversity?

[2] The Manawatu-Wanganui Regional Council is promulgating a combined regional policy statement and regional plan. The statement identifies the regional council as the local authority with responsibility for developing rules controlling the use of land for the purpose of maintaining indigenous biodiversity. The plan sets out those rules. Everyone accepts that *someone* may make rules controlling the use of land for the purpose of maintaining indigenous biodiversity. The question here is whom may do so.

[3] In the Environment Court the appellant, Property Rights In New Zealand Incorporated (PRINZ), and Federated Farmers of New Zealand contended that the regional council had no such power. Rather the power vested in territorial authorities (district and city councils). The respondent Council contended that the power vested in it to determine whether such rules were made at regional or territorial level. The territorial authorities did not participate in this argument. They had been consulted on the proposed plan. Some made submissions. None opposed or appealed the indigenous biodiversity provisions.[1]

[4] The Environment Court, in a preliminary decision dated 21 December 2011, sided with the Council. It held that s 30(1)(ga) of the Resource Management Act 1991 (the Act) required regional councils to establish objectives, policies and methods (including rules) for maintaining indigenous biodiversity.

[5] PRINZ appeals that decision to the High Court. On this occasion it is not supported by Federated Farmers.

Background

Statutory scheme

[6] Section 30(1) of the Act provides, in part:

> **30 Functions of regional councils under this Act**
>
> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
>
> (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
>
> (c) the control of the use of land for the purpose of—
>
> (i) soil conservation:

[1] Indeed, two have relied on them already in notifying their own district plans.

(ii) the maintenance and enhancement of the quality of water in water bodies and coastal water:

(iii) the maintenance of the quantity of water in water bodies and coastal water:

(iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:

(iv) the avoidance or mitigation of natural hazards:

(v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

...

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

...

Paragraph (ga) was added by the Resource Management Amendment Act 2003. The background to the amendment was as follows.

[7] In February 2000 the government issued the New Zealand Biodiversity Strategy. It was issued in part-fulfilment of New Zealand's international obligations under the 1992 Rio Convention on Biological Diversity. The Strategy document had the goal of establishing a framework to arrest the decline in indigenous biodiversity that had followed settlement and subsequent human exploitation of the country's natural resources. The Strategy records that New Zealand, one of the last places to be settled by humanity, has gone on to achieve one of the worst records of indigenous biodiversity loss on the planet. There was the loss of our larger bird species following initial human habitation. By the start of the seventeenth century about a third of the country's original forests had been replaced by grasslands. From the mid-nineteenth century expanding European settlement "started a new wave of forest destruction". A further third or so of our original forestation has been converted to farmlands. Extensive modification of wetlands, dunelands, river and lake systems, and coastal areas has also occurred.[2]

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2 *New Zealand Biodiversity Strategy* (New Zealand Government, Wellington, 2000) at 4.

[8] The same month a ministerial advisory committee proposed that regional councils take a lead role in managing biodiversity affected by private land management.[3] One consideration influencing that view was that regional council administrative boundaries, being catchment-based, more closely aligned with ecological boundaries than did territorial boundaries. Another was that regional councils' existing biophysical functions generally were more closely related to biodiversity management than the broader functions of territorial authorities, so that regional council staff held expertise in many areas of direct relevant to biodiversity.

[9] In its final report, in August 2000, the committee recommended that regional councils take the – not just *a* - primary governance role in indigenous biodiversity:[4]

> On the question of sub-national governance, we have firmed in our preliminary views that regional councils should assume the primary governance role for biodiversity.
>
> In our preliminary report we identified a number of reasons for our preference for regional council leadership. Further policy work supported our reasoning, as did the majority of submissions. Some urged that the contribution of territorial authorities should not be under-estimated (or under-valued). We agree, and our proposal for regional leadership should not be construed as being critical of territorial authorities. We do, however, find the case for a regional integrated approach compelling.

[10] The committee acknowledged that giving both regional councils and territorial authorities biodiversity responsibilities would create an overlap in functions. It thought that an "unavoidable necessity", but not unworkable given that similar overlap existed for hazardous substances and natural hazards.[5]

[11] The May 2001 report of the Local Government and Environment Select Committee recommended that regional councils' functions be expanded by allowing "regional councils to contribute to biodiversity management through the

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3 *Bio-what? Preliminary Report of the Ministerial Advisory Committee* (Ministry for the Environment, Wellington, 2000) at 35.

4 *Final Report of the Ministerial of Advisory Committee on Biodiversity and Private Land* (Ministry for the Environment, Wellington, 2000) at 65–67.

5 At 69.

establishment of methods as well as policies and objectives".[6] As to overlap, the select committee said:[7]

> Issues of overlap between the biodiversity management functions of regional councils and territorial authorities should be resolved through the regional policy statement process, in the same way that overlap issues are resolved for the management of natural hazards and hazardous substances. An amendment to proposed new section 62 will require that the regional policy statement state which local authority has responsibility for dealing with the maintenance of indigenous biological diversity.

[12] One result of this policy analysis was the addition of s 30(1)(ga). Others were amendments to ss 62 and 65. I will set s 62 out in full, as it is central to the disposition of this appeal:

> **62 Contents of regional policy statements**
>
> (1) A regional policy statement must state—
>
> (a) the significant resource management issues for the region; and
>
> (b) the resource management issues of significance to iwi authorities in the region; and
>
> (c) the objectives sought to be achieved by the statement; and
>
> (d) the policies for those issues and objectives and an explanation of those policies; and
>
> (e) the methods (excluding rules) used, or to be used, to implement the policies; and
>
> (f) the principal reasons for adopting the objectives, policies, and methods of implementation set out in the statement; and
>
> (g) the environmental results anticipated from implementation of those policies and methods; and
>
> (h) the processes to be used to deal with issues that cross local authority boundaries, and issues between territorial authorities or between regions; and
>
> (i) the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—
>
> (i) to avoid or mitigate natural hazards or any group of hazards; and

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6 Resource Management Bill 1999 (Local Government and Environment Select Committee Report) at 24. That Bill did not progress. The Resource Management Amendment Bill (No 2) 2003, based on part of the 1999 Bill was then introduced in March 2003, and was assented to in May 2003.

7 At 24.

(ii) to prevent or mitigate the adverse effects of the storage, use, disposal, or transportation of hazardous substances; and

(iii) to maintain indigenous biological diversity; and

(j) the procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement; and

(k) any other information required for the purpose of the regional council's functions, powers, and duties under this Act.

(2) If no responsibilities are specified in the regional policy statement for functions described in subsection (1)(i)(i) or (ii), the regional council retains primary responsibility for the function in subsection (1)(i)(i) and the territorial authorities of the region retain primary responsibility for the function in subsection (1)(i)(ii).

Notably there is no default provision in s 62(2) to determine who has primary responsibility for the function described at s 62(1)(i)(iii), in the event that the regional policy statement fails to make an express allocation.

[13] But the key point to be taken from s 62(1), after its 2003 amendment, is that it is the regional policy statement – a regional council instrument – that is to *identify* the "*local authority* responsible ... for specifying the objectives, policies and methods for the control of the use of land ... to maintain indigenous biological diversity". Both regional councils and territorial authorities are "local authorities" for the purposes of the Act.

[14] Section 65 was also amended consequently in 2003. Section 65(1) reads:

65 Preparation and change of other regional plans

(1) A regional council may prepare a regional plan for the whole or part of its region for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g), or (ga).

That provision empowers a regional council to prepare a regional plan for the function specified in s 30(1)(ga). There is no mention there of the functions described in s 30(1)(a) and (b). The same exception is carried through in s 68(1)(a). As the Environment Court said in its decision, these exceptions make perfect sense. A regional council does not need to make rules about establishing, implementing and

reviewing, or preparing, objectives, policies and methods - the functions described in s 30(1)(a) and (b).

[15] Finally, I note two further provisions. First, s 31 of the Act defines the functions of territorial authorities. It reads, in part:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
>
> (i) the avoidance or mitigation of natural hazards; and
>
> (ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
>
> (iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:
>
> (iii) the maintenance of indigenous biological diversity:
>
> ...

It may be noted that paragraph (b)(iii) was added in its present form in 2003. Secondly, there is s 75(4). It provides that a district plan cannot be inconsistent with a regional plan.

Proposed One Plan

[16] As I mentioned in the Introduction, the Council has promulgated a combined regional policy statement and regional plan. There is a power to do so in s 80(2) of the Act. The proposed instrument is called the "One Plan". As it is still a proposed plan (and statement) it has become known as the "POP". The POP was notified in

May 2007. Its function is to replace the current regional policy statement and six operative regional plans. It received over 400 submissions. Seven affected territorial authorities made submissions. Following a hearing at Council level, the Council made decisions on the POP. Appeals against those decisions are now being heard by the Environment Court.

[17] One of the submissions came from the appellant, PRINZ. Another from Federated Farmers of New Zealand (Federated Farmers). Their submissions, as far as relevant to this appeal, concerned policy 7-1 and rule 12-6 of the POP.

[18] Policy 7-1 (in the decisions version) reads:

> **Policy 7-1: Responsibilities for maintaining indigenous biological diversity**
>
> In accordance with s 62(1)(i) RMA, local authority responsibilities for controlling land use activities for the purpose of managing indigenous biological diversity in the Region are apportioned as follows:
>
> (a) *The Regional Council must be responsible for:*
>
> (i) developing objectives, policies and methods for the purpose of establishing a Region-wide approach for maintaining indigenous biological diversity, including enhancement where appropriate
>
> (ii) Developing rules controlling the use of land to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna and to maintain indigenous biological diversity, including enhancement where appropriate.
>
> (b) *Territorial Authorities must be responsible for:*
>
> (ii) retaining schedules of notable trees and amenity trees in their district plans or such other measures as they see fit for the purpose of recognising amenity, intrinsic and cultural values associate with indigenous biological diversity, but not for the purpose of protecting significant indigenous vegetation and significant habitats of indigenous fauna as described in (a)(ii) above.
>
> (c) *Both the Regional Council and Territorial Authorities must be responsible for:*
>
> (i) recognising and providing for matters described in s 6(c) RMA and having particular regard to matters identified in s 7(d) RMA when exercising functions and powers under the RMA, outside the specific responsibilities allocated above,

> including when making decisions on resource consent applications.

So it would seem that the policy contemplates the Council having overarching responsibility for developing objectives, policies and methods (which include rules) concerning indigenous biodiversity at a region-wide level, and making rules concerning the use of land to maintain indigenous biodiversity. The territorial authorities have a subordinate role.

[19] Rule 12-6 (again in the decisions version) classifies various activities (including vegetation clearance, forestry and diverting water) as discretionary activities where they take place within a rare, threatened, or at risk habitat. That decision itself is controversial. Some appeals contend that the classification should be non-complying. That status would impose a higher threshold for consent: non-complying activities must not be consented if their effects are more than minor or they will otherwise be contrary to the relevant objectives and policies of the plan. If they pass those thresholds, they are considered then on the same basis as a discretionary activity.[8]

[20] PRINZ and Federated Farmers took a different view. They did not think the Council should be making land use rules at all in the area of indigenous biodiversity. They took the view that the Council's powers to control land use were confined to the purposes stated in s 30(1)(c) – soil conservation, water quality and the like.

[21] The Environment Court hearing the appeals on the POP resolved to determine this question as a preliminary issue.

Environment Court decision

[22] The Environment Court held that the functions of the Council regarding land use controls were not confined to those set out in s 30(1)(c). It said:[9]

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8 Resource Management Act 1991, s 104D(1).

9 *Federated Farmers of New Zealand v Manawatu-Wanganui Regional Council* [2011] NZ EnvC 403 at [6].

> There is nothing magic about (c) – it is not a code of purposes by which a regional council is confined in its objective, policy or rule making powers.

Section 30(1)(ga) made it a mandatory function of every regional council to establish objectives, policies and methods for maintaining indigenous biodiversity. That did not exclude rules affecting or controlling the use of land. The Court said:[10]

> If it is reasonably necessary to control the use of land in some way to fulfil the requirement, then there is nothing in s 30 to prohibit that.

The Court concluded:[11]

> The short point is that s 30(1)(ga) means what it says. Regional Councils are required to establish, implement and review objectives, policies and methods (including rules) for maintaining indigenous biological diversity. The content of those objectives, policies and rules may be the subject of debate, but the power of the Council to establish them, subject to process, is beyond doubt.

Submissions

PRINZ

[23] A member of PRINZ, Mr Mike Plowman, argued the case for PRINZ. There was some irony in his doing so. He is an elected regional councillor of the respondent Council. Mr Plowman's argument, in essence, was that notwithstanding s 30(1)(ga), regional councils do not have rule-making power to control land use to protect areas of significant indigenous vegetation and fauna. Section 31(1)(b)(iii) is clear in giving territorial authorities the function of controlling land use for the purpose of maintaining indigenous biodiversity. Mr Plowman argued that a regional council does not have the power to allocate to itself functions that are allocated to territorial authorities by the Act – here s 31(1)(b)(iii). Those functions must first be transferred from the territorial authority to the regional council under s 33.

[24] Secondly, s 68(1) precludes the regional council including rules for the purpose of carrying out s 30(1)(a) and (b) functions. That, says Mr Plowman, impliedly also includes the s 30(1)(ga) function which is effectively assimilated

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10 At [7].
11 At [14].

within s 30(1)(a) and (b). Some support for that submission is to be found in *Brookers Resource Management* where it says:[12]

> Section 68(1) limits the powers of regional councils to make rules in relation to functions conferred by s 30(1)(a), 30(1)(b) *and 30(1)(ga)*. Rules are clearly envisaged by paragraphs (c) to (g), which relate to control. Accordingly, where Part 2 matters are relevant to the functions covered by paragraphs (c) to (g) those matters may be dealt with by way of rules as well as by objectives and policy. [Emphasis added].

[25] Thirdly, Mr Plowman conceded (as did Mr Gardner for Federated Farmers) that "methods" in s 30(1)(ga) includes rules. Later Mr Plowman sought to withdraw that concession. Ultimately he sought to maintain a "methods" within s 30(1)(ga) contemplated only non-regulatory responses.

Council

[26] On behalf of the Council, Mr John Maassen argued that s 30(1)(ga), together with other key provisions in Part 4 of the Act, gives regional councils statutory authority to control land use for the purpose of maintaining indigenous biodiversity. That, he said, was the direct consequence of the 2003 Amendment Act. Particular provisions Mr Maassen relied on were ss 30(1)(ga), 62(1)(i)(iii) and 68(1). He submitted also that the planning context supported the Council's interpretation. The word "methods" is used in the Act, and in s 30(1)(ga) in particular, can include both rules and non-regulatory methods.

[27] Mr Maassen referred also to the legislative history discussed earlier, and to the social and local authority context. He noted that the evidence suggested that the region had within a five year period experienced a loss of 1,322 hectares of indigenous vegetation, particularly in lowland areas. As the ministerial advisory committee had noted in 2001,[13] regional boundary and catchment-related scale were better suited to the management of indigenous biodiversity through the management of catchments and land forms than distributed territorial authorities. In addition, regional councils possess the necessary scientific knowledge, experience and data to achieve integrated management of indigenous biodiversity. He noted in this case

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12 *Brookers Resource Management* (online looseleaf ed, Brookers) at [A30.04(2)].

13 See at [8] above.

there was apparent support from the seven territorial authorities affected for the jurisdictional approach taken in the POP.

Federated Farmers

[28] Federated Farmers of New Zealand was a party to the original appeal. It is not an appellant in the present proceeding, as it does not support PRINZ's appeal. However Mr Richard Gardner made helpful submissions indicating the position of Federated Farmers. In essence Federated Farmers would have preferred the jurisdiction issue not be dealt on a preliminary question. However the reality is that the Environment Court has set that preliminary question, resolved it and this is an appeal from it. On the substance of the appeal Mr Gardner did not support the argument by PRINZ that a regional council may not include rules in its regional plan related to indigenous biodiversity. He agreed with the finding of the Environment Court that "methods" in s 30(1)(ga) can include rules.

Analysis

[29] Five points need to be made.

[30] First, s 68(1) plainly empowers the Council to make rules for the purposes of carrying out any functions conferred on it under the Act, save those in s 30(1)(a) and (b). Parliament did not see fit to also except s 30(1)(ga). By virtue of the latter provision, one of its functions is the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity. So plainly the Council may make rules in its regional plan – here the POP – for that purpose. On the face of the Act there is no basis to exclude it doing so in relation to the use of private land. There is no apparent or valid basis to assimilate the s 30(1)(ga) function within s 30(1)(a) and (b), as PRINZ submits. The passage in *Brookers Resource Management* cited earlier[14] and which suggests otherwise is incorrect. The function in s 30(1)(ga) also embraces controls on the use of land – as the third point made below confirms.

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[14] At [24].

[31] Secondly, s 30(1)(ga) creates a mandatory obligation on the part of regional councils to make objectives, policies and methods for the maintenance of indigenous biological diversity. Such methods may include rules. The Council contends that. Federated Farmers concedes that. PRINZ did likewise until the implications of its concession became plain. At the end of the day, s 68(1) confirms that. More generally, a "method" is what it says: a way of doing something. In its RMA context it may include rules. Sections 31(2), 32(4)(a), 67(2)(b) and 75(2)(b), for instance, all make that abundantly clear. Methods are not confined to rules (there may be non-regulatory methods too), but necessarily they may include rules.

[32] Thirdly, it is true that s 30(1)(c) provides that it is a function of a regional council to control the use of land for certain purposes. The maintenance of indigenous biodiversity is not expressly named within that provision. I do not however accept that it is consistent with the purpose of the 2003 amendment to read down s 30(1)(ga) so that it includes every relevant function apart from controls over the use of land. Context suggests that was not what Parliament intended. Rather, s 30(1)(ga) was located outside of s 30(1)(c) simply because that function is broader than the control of the use of land - although it may include such controls.

[33] Fourthly, it is also true that s 31(1)(b)(iii) gives territorial authorities a similar function, specifically in relation to controls over the use of land. Such controls are the particular concern of territorial authorities, just as air, water and the coastal marine area (the latter on a shared basis) are the particular concern of regional councils. But the existence of a functional overlap was expressly anticipated by the legislature, as the select committee report discussed earlier demonstrates.[15] Parliament resolved the potential conflict in two ways. First, by the 2003 amendment made to s 62, concerning the mandatory requirements of regional policy statements. Such a statement must be prepared by the relevant regional council.[16] And by reason of s 62(1)(i) it is specifically the regional council, through its regional policy statement, that is to decide which local authority (i.e. the regional council or the relevant territorial authority)[17] is to be responsible for specifying the objectives,

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15 At [10].
16 Section 60(1).
17 See s 62(2).

policies, and methods (i.e. including rules) for the control of the use of land to avoid or mitigate natural hazards and hazardous substances – *and* to maintain indigenous biodiversity. Policy 7-1 is exactly the exercise of allocative responsibility intended by that provision. The regional policy statement may determine that a territorial has either some or no rule-making role in relation to controls of land use to maintain indigenous biodiversity. Secondly, s 75(4) resolves any residual conflict between regional and territorial plans. It provides that a district plan cannot be inconsistent with a regional plan

[34] Finally, as the responsibility is given to regional councils to allocate the relative rule-making roles of regional and territorial authorities under s 62(1)(i), no issue of transfer of functions arises under s 33.

Conclusion

[35] It follows that I agree with the conclusion reached at first instance by the Environment Court.

Disposition

[36] The appeal is dismissed.

[37] The Council is entitled to costs. If they cannot be agreed, memoranda may be submitted.

Stephen Kós J

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