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DECISION-MAKING UNDER THE *RESOURCE MANAGEMENT ACT 1991* (NZ)

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I INTRODUCTION

The purpose of this paper is to assess the quality of decision-making under the *Resource Management Act 1991*(NZ) (RMA or Act). Fifteen years have passed since enactment of the legislation, which provided a landmark in the reform and integration of various disparate statutes dealing with land use regulation, land subdivision, water utilisation, discharge of wastes, air omissions, and control of the coastal marine area.

The Parliamentary intention was to achieve integrated management of natural and physical resources, and to provide a common purpose of sustainable management for decision-making in respect of any development. This intention involves substantive and process integration, and horizontal and vertical integration.[1]

II OBJECTIVES

The objectives of the RMA are set out in part 2 of the Act. This part comprises the main purpose s 5, a statement of matters of national importance in s 6, a statement of other relevant matters in s 7, and a recognition of the settlement obligations with Māori under the Treaty of Waitangi (1840), s 8. The original s 5 remains unchanged, with minor amendments having been made to ss 6 and 7. These provisions are central to all decision-making. The primary s 5 is set out below:

A *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,

[1] See David Grinlinton, 'Contemporary Environmental Law in New Zealand', in Klaus Bosselmann and David Grinlinton (ed), *Environmental Law for a Sustainable Society* (2002) New Zealand Centre for Environmental Law 19, 31; Ulrich Klein, 'Integrated Resource Management in New Zealand – a Juridical Analysis of Policy, Plan and Rule Making under the RMA' (2001) 5 *New Zealand Journal of Environmental Law* 1 (substantive and process integration, vertical and horizontal integration).

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.

Section 5 states the overriding purpose of the legislation, namely 'To promote the sustainable management of natural and physical resources'. It may be noted that this objective is narrower than the more commonly recognised objective of 'sustainable development'. The history of the recognition of sustainable development is well catalogued, deriving in particular from the Stockholm Conference 1972, the general acceptance and endorsement by the Brundtland Commission in 1987, and the formal acceptance in the Rio Declaration of 1992.[2] A conscious decision was made to limit the scope of the RMA to the purpose of sustainable management, upon the understanding that the social and economic objectives would be implemented through other legislative powers and governance provisions.[3]

The interpretation within New Zealand of the pivotal ss 5, 6, 7, has been the subject of many decisions of the Planning Tribunal, being the appellate body continued under the 1991 Act, and its successor from 1997 onwards, the Environment Court, and through decisions of the higher courts on further appeals on points of law.

In respect of the definition of sustainable management contained in s 5(2), this has given rise to specific questions as to the relationship between the management type

[2] Klaus Bosselmann, 'The Concept of Sustainable Development', in Klaus Bosselmann and David Grinlinton (ed), *Environmental Law for a Sustainable Society*, (2002) New Zealand Centre for Environmental Law 19, 31, 81. See also Derek Nolan, *Environmental and Resource Management Law in New Zealand* (3rd ed, 2005) [1.1-1.23], [2.3-2.6], [3.4-3.10].

[3] Anthony Randerson, *Report of the Review Group on the Resource Management Bill* (1991) [3.3]. See also Nolan, above n 2, [3.10].

functions in the first part of the definition and the ecological 'bottom lines' under paragraphs (a)-(c).

Speaking of part 2 as a whole, Grieg J observed in the NZ Rail case:[4]

> This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the [Environment Court], with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

The case also determines that there is a hierarchy within the sections, to the extent that the matters of national importance identified in s 6 and other matters in s 7, are to be addressed 'in achieving the purpose of this Act' under s 5. The purpose of sustainable management under s 5 is the primary provision, and a decision justified under s 5 may override countervailing matters arising under s 6 and s 7.[5]

In respect of the definition of sustainable management in s 5(2), an academic debate has waged as to the interpretation to be given to the conjunction 'while' which connects the initial anthropocentric management function of promoting the wellbeing of communities, and the perceivable bottom line ecological function in paragraphs (a), (b) and (c) of the definition.[6] The earlier decisions also reflected the uncertainty of the definition, and challenged political assertions that if there were no adverse effects

[4] *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70, 86.
[5] Ibid 85. The Court upheld a decision of the Environment Court approving an export wharf in an undeveloped coastal area, as the value of the wharf outweighed protection of the coastal landscape as a matter of 'sustainable management' in s 5.
[6] Bruce Harris, 'Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt' (1992) 2 *Otago Law Review* 553: Janet McLean, 'New Zealand's Resource Management Act 1991: Process with Purpose?' (1992) 7 *Otago Law Review* 538; See also Professor Malcolm Grant, 'Sustainable Management: a Sustainable Ethic?' (1995) November/December *Resource Management News* (NZ) 6.

on the environment then there could be no justification for regulation of the inherent right to develop property or carry on any activity on land.[7]

More recently a judicial consensus has emerged in the Environment Court as to the appropriate interpretation of s 5. After reference to the management function and then the ecological goals in the second part of the definition, the Court has stated:[8]

> The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose….Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and its relative significance or proportion in the final outcome.

The particular case involved the determination of a metropolitan urban boundary, to avoid encroachment on a nearby pristine estuary area.

III GOVERNANCE UNDER THE RMA

Hortatory statements of purpose in legislation are seldom sufficient to achieve the objectives unless an effective governance structure is in place to deliver the desired outcomes. Prior to enactment of the RMA, the local government structure was reformed in 1988 by the Local Government Commission, implementing special legislation, to reduce the number of local authorities through amalgamations. The outcome was to establish a regional tier of local authorities, and a second tier of city and district councils (territorial authorities), being of sufficient size to have the capacity and resources to implement an effective resource management regime.[9]

[7] Harris, above n 6. See also Nolan, above n 2, [3.22- 3.31].

[8] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, 94 (Judge Sheppard, Commissioner Catchpole, Commissioner Kerr).

[9] See Kenneth Palmer, *Local Government Law in New Zealand* (2nd ed, 1993) 7. See also *Local Government Act 2002* (NZ), sch 2 (listing of 12 regional councils, 74 territorial authorities (city or district councils)).

The top level, comprising central government, empowers the issue of supplementary regulations, the declaration of national policy statements, and issue national environmental standards. To date no national policy statements have been made, but 14 national environmental standards were issued in 2004, prescribing certain minimum air pollution rules.[10] In addition to these top tier provisions, a mandatory New Zealand Coastal Policy Statement (NZCPS) has been promulgated (1994), and various water conservation orders have been issued to protect rivers of high scenic value.[11] Likewise, in 2005, certain reserve powers were vested in the Minister for the Environment, to allow for a direction to a regional council to deal with a resource management issue.[12]

Below the top tier, regional councils have the function of establishing broad regional policy statements on environmental matters, designed to achieve integrated management of natural and physical resources for the region. The statement may impose policies prescribing metropolitan urban limits.[13] More specifically, the regional council must establish a regional coastal plan for adjoining water areas, to regulate any development below mean high water springs and the territorial sea limits. The council may establish other regional plans containing specific rules to regulate water use, air quality, and activities on land affecting soil conservation and land use hazards. The regional policy and plans must be consistent with the top tier documents, and plans must give effect to the NZCPS and regional policy statement.[14]

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[10] *Resource Management (National Environmental Standards Relating to Certain Air Pollutants, Dioxins & Other Toxics) Amendment Regulations 2005 (SR 2005/214)*; See Nolan, above n 2, [10.25-10.37].

[11] RMA, ss 56-58 (the New Zealand Coastal Policy Statement *1994* is due for review); RMA ss 199-217 (Water Conservation Orders). See also Nolan, above n 2, [5.11] (New Zealand Coastal Policy Statement), [8.62] (Water Conservation Orders).

[12] RMA s 25A. This power was added to overcome uncertainties arising out of 'Project Aqua', a proposal by Genesis Energy to dam the lower Waitaki River and take 73 per cent of the water flow. The Government enacted the *Resource Management (Waitaki Catchment) Amendment Act 2004* to set up a special water allocation board, to provide a water allocation plan; See Nolan, above n 2, [8.49].

[13] Ibid ss 30, 59-62; See *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18; [1995] NZRMA 424 (precise MUL policy upheld).

[14] Ibid ss 63-71; See Nolan, above n 2, [3.81-3.85].

At the district level, the policies and rules are combined in the District Plan. This plan must give effect to any national policy statement, the NZCPS, and any regional policy statement. The plan must not be inconsistent with a regional plan on a matter under the regional jurisdiction.[15] The courts have recognised the hierarchy of instruments applicable, and have indicated that local authorities should act in a complementary manner rather than attempt to contest jurisdiction. Any disputes between a regional council and a territorial authority may be referred to the Environment Court for determination on the merits.[16]

In relation to the actual delivery of services, rather than regulation, other legislation may be relevant. For example, the strategic planning of land transport programmes and the funding of land transport services and roading construction is supplemented by other statutes.[17]

Within the local authorities, the elected councils have the formal functions of approving policy statements and plans, which may include specific rules. The relevant legislation provides for the full council to delegate to committees, or appoint independent planning commissioners, to preside over the hearings of submissions on plan preparation, and applications and submissions in respect of resource consent applications.[18] Except in relation to approval of regional coastal plans and applications for a restricted coastal activity, which decided by the Minister for Conservation, all other decisions are effectively approved by the regional or territorial authorities, subject to rights of appeal and determinations by the Environment Court and higher courts.[19]

[15] Ibid ss 72-77D; See Nolan, above n 2, [3.86-3.101].
[16] Ibid s 82. See *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 (co-ordination of functions).
[17] *Transit New Zealand Act 1989* (NZ); *Land Transport Management Act 2003* (NZ); *Land Transport Act 1998* (NZ); *Local Government Act 1974* (NZ); *Local Government Act 2002* (LGA) (NZ).
[18] RMA, ss 34, 34A; LGA 2002, sch 7, cl 32.
[19] RMA, sch 1, cls 16-20. The Minister for the Environment retains the final power of approval for a water conservation order; Ibid ss 214, 215.

IV Public Participation

In the seminal work of Professor McAuslin, the three main ideologies of planning were identified, namely the ideology of private property rights, the ideology of works or development in the public interest, and the more recent ideology of public participation.[20] The RMA affirms the recognition of public participation and local administration as a fundamental policy feature.

In relation to the preparation of policy statements and plans at the regional and district level, the prescribed procedures require initial consultation with certain interested parties, including Māori (iwi). This participation is to be real and effective, amounting in respect of iwi to affirmative participation.[21] Where a proposed policy statement or plan is announced, an opportunity arises for any person without a status requirement to make a submission, and for other persons to make supplementary submissions arising out of the earlier submissions. The person who makes a submission also obtains a status to appeal to the Environment Court, in the event of a contested decision.[22]

With respect to participation in resource consent applications, a more limited right of participation has evolved, due essentially to the discretion given to a local authority to dispense with full or partial notification of the application. In practice, up to 95 per cent of applications for consents are not notified. The statute allows for notification to be dispensed with where the consent authority is satisfied the adverse effects on the environment will be minor.[23] In determining this question, the consent authority may disregard an adverse effect if the plan permits an activity with that effect.[24] Where full notification is required, then any person has the status to make a submission and to take an appeal to the Environment Court.

[20] Patrick McAuslan, *The Ideologies of Planning Law* (1980).
[21] RMA, sch 1, clauses 2-3C (as amended 2005).
[22] Ibid sch 1, cls 4-8A, 14. See Nolan, above n 2, [3.103].
[23] Ibid s 93.
[24] Ibid s 94A. See *Bayley v Manukau City Council* [1998] NZRMA 513; *Videbeck v Auckland City Council* [2003] NZRMA 113; *Urban Auckland–Society for the Protection of Auckland City and Waterfront Inc v Auckland City Council* [2005] NZRMA 155.

Where full notification is not required, a second consideration requires the consent authority to serve notice of the application on individual persons who may be adversely affected by the activity, unless all those persons have given written approval to the activity.[25]

The determination of whether or not to notify an application has given rise to a series of judicial review decisions. An applicant for a resource consent is required to include an assessment of environmental effects, and this should include information as to persons who may be adversely affected. In practice this information may minimalise the effects.[26] The types of cases include neighbours whose views have been affected or properties shaded by adjoining developments, and consents have been given without notice. Equally problematic are the cases involving essentially trade competitors, who wish to delay or prevent some competing development. Strictly, the RMA states that a consent authority 'must not have regard to trade competition when considering an application', as the Act is not intended to be a regulatory enactment between specific competitors.[27]

A notable recent decision, being the first decision of the Supreme Court in an RMA matter, is the *Westfield and Discount Brands* case.[28] Westfield, as owner of a competing shopping centre, and Northcote Mainstreet Inc, a trade group of shopkeepers in an adjoining centre, jointly challenged the granting of a consent without notification to Discount Brands to establish a discount centre in another locality. The Court emphasised the importance of the district plan zoning policies, and the presumption in favour of notification. Justice Elias stated (para 10):

[25] Ibid ss 94, 94B. See *Westfield (New Zealand) Ltd v Northcote Mainstreet Inc* [2005] NZRMA 337.

[26] Ibid s 88, schedule 4 (content of assessment of environmental effects (AEE) is to correspond to the scale and significance of the effects). A consent authority may require further information: ibid s 92, 92A, 92B.

[27] Ibid s 104(3). See *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433. Trade competition may extend not only to direct traders, but also to owners of properties who have an interest in leasing the properties with good returns.

[28] *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZRMA 337.

> 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. A plan has legislative status. People and communities can order their lives under it with some assurance…A district plan is a frame within which resource consent has to be assessed.

The Court found that the council decision dispensing with notification had not been based upon sufficient credible information to allow a valid determination to be made.[29]

This case, and others, indicates the fact specific nature of the determination in dispensing with notification. A balance is required between the objective of public participation on the one hand, and the reality of increased compliance costs, delay, and possible self-centred motives raised by submitters. The participation ideal is often problematic in relation to infrastructure development such as roads, and increases in density of development.

V IMPROVING THE QUALITY OF DECISION MAKING

Decision making in respect of the preparation of regional and district plans, and in respect of resource consent applications, will first arise at the local authority level. In practice, local authorities will appoint a planning committee or commissioners to assess and adjudicate on these matters or make recommendations back to the full council. The procedures, under lawful delegated powers, may result in a decision which binds the local authority.[30]

A *Accreditation of Decision Makers*

Arising out of government initiatives to improve the quality and efficiency of decision making under the RMA at the local authority stage, amendments in 2005 provide for

[29] A second consent, granted before the SC decision, was upheld as valid in *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC) (Lang J).

[30] RMA, ss 34, 34A. Concerning delegation to a corporate body, it is not entitled to grant a resource consent, but may undertake the preliminary processing: *Just One Life Ltd v Queenstown Lakes District Council* [2004] NZRMA 325 (corporate body cannot be an officer of a local authority).

the Minister for the Environment to approve qualifications establishing a person's accreditation. By provisions coming into force in late 2006 and 2007, a single commissioner or the chair of a committee, must be an accredited person, and by the latter date, half of the persons in a committee must be accredited. The accreditation programme has been implemented by contract through the Ministry with a university based provider.[31] The programme requires attendance at one or more workshops.[32]

B *Hearing Procedures and Details of Decision*

In 2005, consent authorities were given additional powers to hold pre-hearing meetings, and by agreement may refer the parties to mediation. More generally, the hearing authority may give directions to an applicant or submitter to provide briefs of evidence before the hearing.[33]. The authority may direct a submission be struck out if considered to be frivolous or vexatious.[34]

To enhance the quality of a decision, it is stipulated that the decision must state in writing the relevant statutory provisions, the relevant provisions in the respective plans which have been considered, the principal issues in contention, a summary of evidence, and main findings of fact.[35]

Cross examination is not permitted at the local authority level, whereas full cross examination is permissible on appeal before the Environment Court.[36] The convention is for a full re-hearing in person of all the evidence at the Environment Court level.[37]

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[31] Ibid ss 39A, 39B, 39C; See Trevor Daya-Winterbottom, 'RMA Déjà Vu: Reviewing the Resource Management Act 1991' (2004) 8 *New Zealand Journal of Environmental Law* 209, 224.

[32] The present accreditation programme is operated through the Continuing Education Department of the University of Auckland, and is offered in three city centres during the year. Several role plays for hearings are conducted. A written exercise must be completed. An update is required within three years of the main instruction.

[33] RMA, ss 41A, 41B, 99, 99A (inserted 2005). See Daya-Winterbottom, above n 31, 225.

[34] Ibid s 41C.

[35] Ibid s 113.

[36] Ibid ss 39(2), 269, 278.

[37] Ibid ss 276(1A) (admission of evidence), 290A (lower authority decision). See *Wellington City v Carson* [1972] NZLR 698; *Leith v Auckland City Council* [1995] NZRMA 400, 408. See also Daya-Winterbottom, above n 31, 232.

C *Call-in Power*

A proposed development of national significance may be of such interest that an appeal is inevitable, and a full re-hearing may be foreseen as an expensive duplication of procedures. To remedy this situation, the 'call in' powers of the Minister have been reformed. On application, the Minister for the Environment now has a discretion in respect of a major plan change, resource consent, requirement for a designation or a heritage order, to consider the options of referring the hearing direct to a special board of inquiry (presided over by an Environment Judge), or to the Environment Court itself.[38]

IV ENVIRONMENT COURT – ADMINISTRATIVE AND SUBSTANTIVE VALUE

The Environment Court has its genesis in the Appeal Board established in 1953. The appeal board was re-established as the Planning Tribunal in 1977.[39] The Tribunal was continued under the RMA in 1991, but in 1996 it was reconstituted the Environment Court to better recognise the status and value of the judicial function.[40] The substantive value of the Court is the experience and impartiality with which the many variable and unique applications are assessed and determined.[41] The Environment Judges, in that role, will have exclusive jurisdiction in respect of civil enforcement through applications for declarations, abatement notices, and enforcement orders. The Environment Judges, in their alternate role as District Court Judges, may preside over criminal enforcement of offences under the RMA.[42]

A *Constitution and procedure*

The Environment Court usually comprises for plan and resource consent hearings, a presiding Judge and two Environment Commissioners. The latter persons are

[38] Ibid ss 140-150AA (inserted 2005). The former call-in procedure was used once in respect of a thermal power station established in 1995 (Stratford Combined Cycle Power Station-involving CO2 discharge issues). The power was invoked in respect of the Project Aqua application, but replaced by the water allocation legislation (above n 12). See Daya-Winterbottom, above n 31, 228.

[39] *Town and Country Planning Act 1953* (NZ), s 39; *Town and Country Planning Act 1977* (NZ), s 128 (board constituted a court of record).

[40] RMA, s 247

[41] Ibid ss 248-56. See Nolan, above n 2, [2.21].

[42] Ibid s 309.

appointed from members with experience or expertise in the resource management area. The Court generally has the powers of a District Court, and except as expressly provided, may regulate its own proceedings.[43] The Court has issued practice notes, dealing with matters of procedure, mediation, and expert witnesses. In recent years, the option for mediation has been offered to all appellants as a matter of normal practice. Mediation is subject to consent of the parties.[44] The Court is not entitled to order security for costs, which is a policy decision to avoid community groups being deterred from implementing appeals.[45] However, the Judge may strike out a case considered to be frivolous or vexatious, and may award costs. The risk of a substantial costs award provides a disincentive to applicants or other parties.[46] Legal aid is not available for RMA proceedings generally, but the Ministry for the Environment has a legal assistance fund which may be available in suitable procedures.[47] Decisions of the Environment Court are final subject to appeals on questions of law to the higher courts.[48]

B *Legal precedent in the Environment Court*

The question of legal precedent has arisen in relation to decisions of the Environment Court. The higher courts have determined that legal precedent does not apply to decisions of the Environment Court. However, in assessing resource consent applications, the consent authority, and the Court on appeal, may have regard to 'any other matter the consent authority considers relevant and reasonably necessary to determine the application'. The issue whether a decision may establish a de facto precedent, in the sense that other persons may expect the same outcome in a particular

[43] Ibid ss 265, 278.
[44] Ibid ss 268, 269. Practice Notes: [1998] NZRMA 282; [2005] NZRMA 193. See Vernon Rive, 'Resolving Conflict by Consensus: Environmental Mediation under the Resource Management Act 1991' (1997) 1 *New Zealand Journal of Environmental Law* 201; Kate Mitcalfe, 'Fronting Up – Mediation under the Resource Management Act 1991' (2001) 5 *New Zealand Journal of Environmental Law* 195.
[45] RMA, s 284A.
[46] Ibid ss 279(4), 285 (costs are at the discretion of the Court and no scale applies). See *Peninsula Watchdog Group Inc v Coeur Gold NZ Ltd* [1997] NZRMA 501 (award against environmental group upheld); *Tairua Marine Ltd v Waikato Regional Council* [2006] NZRMA 485 (Asher J) (District Court scale may be used as a guide). See also Nolan, above n 2, [4.82].
[47] See Ministry for the Environment (NZ) <www.mfe.govt.nz> at 26 April 2007.
[48] RMA, ss 295-313. For a question of law, see Nolan, above n 2, [3.110, 4.81].

situation, has been recognised by a number of decisions of the higher courts.[49] For example, Baragwanath J has stated:[50]

> It does not follow from the fact that rigid precedent is unattainable that no regard may lawfully be had to broadly similar decisions. To say that is not to import into environmental decision making the rigid doctrine of precedent… But 'Justice involves two factors – things, and the persons to whom thing are assigned – and it considers that persons who are equal should have assigned to them equal things'. (Aristotle, *Politics* (1952) p 129). Human experience is that not to treat similar cases alike will give rise to suspicion and a deep sense of injustice which it is the duty of the Courts, as well as others who make decisions on behalf of the public, to avoid.

Where a de facto precedent is likely to be established, and that outcome may be desirable, it is open for the local authority or the applicant to seek a plan change, which may accommodate other interested parties and provide for a just outcome in the public interest.[51]

VII CASE EXAMPLES ON DECISION MAKING

A *Acknowledgement of Cultural Concerns*

A matter of national importance stated under s 6(e) is 'the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga' (sacred sites and things). The RMA may be relatively unique in endeavouring to engraft into the mainstream of decision-making, the relevance of cultural relationships of the indigenous people. In practice, this has given rise to a number of contested matters, and controversy as to the relative weight and acknowledgement of the cultural attributes. For example, in separate applications concerning the location of a TV repeater station and a cellphone repeater station on

[49] Ibid s 104(1)(c); See *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (coastal subdivision); *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (restorative planting). See also Nolan, above n 2, [2.22].

[50] *Murphy v Rodney District Council* [2004] 3 NZLR 421, [39] (the appeal concerned an alleged failure to follow earlier subdivision decisions, but did not succeed).

[51] RMA, ss 65, 73, sch 1, cls 21-29.

former Māori land, but still regarded as ancestral and culturally sacred, the Courts determined that the application should not succeed and other sites should be considered.[52]

In relation to abstraction of water from a river for irrigation, the Environment Court came to a compromise type decision, in allowing abstraction which would not exhaust the spirituality of the waterway.[53] Another proposal to discharge treated sewerage effluent from a town sewerage plant into a bay, used by Māori for seafood gathering, was not approved, due to potential cultural offence on the iwi (tribe).[54]

Spiritual beings were to the forefront in an appeal concerning the siting of a regional prison on land regarded as ancestral, but owned by the Crown. The Environment Court was required to consider the impact on beliefs by Māori in a spiritual being (taniwha). The decision approving the prison was upheld on further appeal.[55]

Where Māori have become involved at a late stage in the planning process, after completion of the district plan provisions, the High Court on judicial review of an earlier decision approving development (made on relevant grounds), may find that no relief is available having regard to the priority of property rights of a private owner.[56]

B *Landscape Protection and Heritage*

More recently, in areas of outstanding natural landscape, such as the Queenstown Lakes District, the rural zoning has incorporated detailed policies and rules to regulate the location of building platforms, design and appearance of structures.[57] The zoning and resource consent decisions have recognised the matter of national importance

[52] *TV3Network Services Ltd v Waikato District Council* [1997] NZRMA 539 (HC); *Mason-Riseborough RM v Matamata/Piako District Council* (1997) 4 ELRNZ 31.
[53] *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA193.
[54] *Te Runanga o Taumarere v Northland Regional Council* [1996] NZRMA 77.
[55] *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC), upheld (CA). See also Nolan, above n 2, [14.23].
[56] *Helmbright v Environment Court (No 1)* [2005] NZRMA 118 (building on sacred battlefield knoll not recognised in district plan); *Ngati Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1 (building on sacred stream bank).
[57] See *Wakatipu Environmental Society Inc v Queenstown-Lakes District Council* [2000] NZRMA 59.

under RMA s 6(b) 'the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.' The type of controls may extend to placement out of view lines from highways, height, cladding, and colour of structures, regulation of tree planting and landscaping, including clearance of exotic tree species.[58]

In urban settings, tree protection has conventionally been limited to the listing of specific trees for protection, but more recently general tree protection policies and rules have been promulgated to protect the treescape canopies. Similarly, the listing of heritage buildings for protection may be enlarged to regulate the demolition of all buildings in a zone, say predating 1940. Further overlays to promote retention of character may apply in particular suburban areas.[59]

C *Wind Farms and Power Generation*

The Government, being aware of its ongoing obligations under the Kyoto Protocol and its implementation, in 2004 amended RMA s 7 (other matters to which a consent authority should have particular regard) to include '(i) the effects of climate change', and '(j) the benefits to be derived from the use and development of renewable energy'.[60]

These additional considerations would clearly be relevant to the establishment of wind farms, which are becoming an important consideration having regard to the diminishing availability of hydro electricity resources, concerns arising out of coal

[58] *Queenstown-Lakes District Council v Lakes District Rural Land Owners Society Inc* [2002] NZRMA 81; *Wakatipu Environmental Society Inc v Queenstown-Lakes District Council* [2003] NZRMA 289. In *Gannet Beach Adventures Ltd v Hastings District Council* [2005] NZRMA 311, the Court refused to approve a hotel resort near the Cape Kidnappers gannet colony to protect the outstanding natural features. See also Nolan, above n 2, [3.37, 3.38, 5.48-5.50, 5.66] (adaptive management).

[59] See Auckland City Council District Plan Isthmus 1999, and CBD 2004: available on website <www.aucklandcity.govt.nz> at 26 April 2007. See also Nolan, above n 2, [3.100].

[60] See *Climate Change Response Act 2002* (NZ). New Zealand has ratified the Kyoto Protocol: see also Nolan, above n 2, [10.73-10.81].

fired power stations, the finite natural gas resource, and government policy opposing any nuclear power stations.[61]

The first wind farm appeal to proceed to the Environment Court, in 2005, considered a refusal by the local authority to approve the project.[62] The farm was planned to comprise 18 wind turbines for electricity generation, and was located south of Auckland on a west coast beach front peninsula. The Environment Court, concluded that in terms of sustainable management under s 5 it was important to recognise that 'climate change is a silent but insidious threat that scientists tell us threatens to improperly deprive future generations of their ability to meet their needs'.[63] The consent was granted.

This decision will give strong support for approval of other wind farm proposals, which are now coming to the forefront in significant numbers.[64]

VIII CONCLUSION

This paper initially describes the purpose of sustainable management under the RMA. The outline of objectives has established the framework for decision-making, to provide for the effective integrated environmental management of natural and physical resources. The Act comprises a normative level of purposes, a strategic level of supplementary guidelines, and an operational level through the governance structures.

[61] The *Resource Management (Energy and Climate Change) Amendment Act 2004 (NZ)* also limited the ability of a regional council to impose conditions on a resource consent to mitigate CO2 discharges. The intent was to deal with the issue at a national level, as raised in the decision of the Environment Court in *Environmental Defence Society Inc v Auckland Regional Council* [2002] NZRMA 492.
[62] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541.
[63] Above n 62, [230].
[64] RMA, s 6(b). By analogy, the Court has refused a resort development in an area of outstanding landscape occupied as a gannet breeding ground: *Gannet Beach Adventures Ltd v Hastings District Council* [2005] NZRMA 311 (Cape Kidnappers gannet colony location).

In summary, the quality of decision-making is largely dependent upon the following aspects:

- Clear objectives as to sustainable management and other environmental priorities.
- Integrated governance structures – at central, regional and district levels.
- Efficiency in administration – in plan preparation and processing consents.
- Clarity of planning instruments – avoidance of paper overload.
- Provision for reasonable public participation.
- Competent decision-makers – assisted by programmes for accreditation.
- The Environment Court providing quality direction to bodies and parties.
- Public acceptance of the outcomes of the regulatory processes.

A conclusion can be drawn, that a reasonable balance has been reached between the achievement of the aspiratory objectives of the RMA, the practicalities of implementation and achievement of quality decision-making, the need to constrain compliance costs, and the reality of making decisions which are appropriate in the public and private interests of the country, with its unique environmental attributes.