

BEFORE THE ENVIRONMENT COURT

Decision No. A 117 /2009

IN THE MATTER of an appeal under clause 14 of the First
Schedule of the Resource Management Act
1991 (**the Act**)

BETWEEN THE ENVIROMENTAL DEFENCE
SOCIETY INCORPORATED
(ENV-2007-AKL-000196)
Appellant

AND THE RODNEY DISTRICT COUNCIL
Respondent

Hearing: Auckland on 11, 13, and 14 August 2009

Court: Environment Judge J A Smith (presiding)
Environment Commissioner H A McConachy
Environment Commissioner I Stewart

Counsel: Mr A M B Green and Ms S Schlaepfer for the Environmental Defence
Society (**the EDS**)

Ms B S Carruthers and Ms J A Gregory for the Rodney District Council (**the
District Council**)

Ms L S Fraser and Ms K S Torrence for the Auckland Regional Council (**the
Regional Council**)

Ms G K Chapel for Taumata Plantations Limited (**Taumata**)

Mr P R Gardner for Federated Farmers of New Zealand and Horticulture New
Zealand (**Federated Farmers**)

DECISION OF THE ENVIRONMENT COURT

A. Two additional standards may be imposed:

a) Change to Rule 7.9.4.4.1 similar to that set out in this decision;



- b) Relating to a setback from public roads as discussed in this decision;
- B. The Council is to forward to the other parties, within 20 working days, wording in respect of the proposed standards to be inserted within the plan;
- C. The parties then have 10 working days to respond;
- D. If agreement cannot be reached the Council is to file a memorandum with its proposed provisions within 10 working days thereafter, and all other parties within 10 further working days.
- E. Subject to A above, the appeal is dismissed.
- F. No party seeks costs. Accordingly there is no order as to costs

REASONS FOR THE DECISION

Introduction

[1] Should forestry be subject to additional controls and different activity status within the Landscape Protection Rural Zone (LPR) and the East Coast Rural Zone (ECR) given that it is a permitted activity otherwise in the Rural Area?

The Issues

[2] The Society originally sought either discretionary or non-complying activity status within the Landscape Protection Rural zone and the East Coast Rural Zone at the LPR and ECR respectively.

[3] However by the time of hearing their position was significantly refined to:

- (a) permit forestry up to 10 hectares in the LPR and ECR zones subject to standards applying to all permitted forestry within the Rural Area;
- (b) applying controlled activity status to forestry greater than 10 hectares in those zones where a management plan is prepared and submitted; and



- (c) apply restricted discretionary status to forestry greater than 10 hectares in those zones where a management plan is not submitted as part of the application.

[4] Given that change in position by the EDS it is fair to say that the majority of experts before the Court agreed that there should at least be some additional standards to forestry as a permitted activity. For this Court the question is firstly:

- (a) what appropriate standards should apply to permitted forestry activity at least within the LPR and ECR subzones; and
- (b) do those better address the identified effects than the controlled and restricted discretionary activity status identified by the appellant?

The LPR and ECR Zones

[5] The LPR and ECR are subzones within the general Rural Zone of Rodney District. The LPR zone broadly correlates, but not exactly, with various outstanding natural features and landscapes, and also areas of sensitivity and quality identified as of regional high value areas 5, 6 or 7 in the Regional Policy Statement (RPS).

[6] All counsel identified these Regional High Value areas as outstanding and also as regionally significant landscapes in terms of both quality and sensitivity. When these Regional High Value Areas are displayed on the same maps as those for the LPR and ECR there are some of RPS areas included within both the LPR and ECR but there are extensive areas that are not included. As Ms Absolum, a landscape architect called for EDS, noted:

As can be seen all five areas of the East Coast Rural and Landscape Rural zones contain substantial areas also identified as outstanding on a region-wide basis.

The identification of the five areas within the East Coast Rural and Landscape Protection Rural zones in the PDP, as being different from the landscapes included in the General Rural zone is from my own observations justified. They are sensitive and attractive coastal landscapes. Care with how development is enabled to ensure impact on those landscape values is managed, is in my view appropriate.



[7] The Regional Council did not call any evidence. However, Ms Fraser in her submissions for the Regional Council said that the Proposed District Plan falls short of *Methods 6.4.20* of the RPS which intends that district plans give effect to the specific directions to protect landscapes set out in *Policies: Landscape 6.4.19(1)*.

[8] It is quite clear that the Regional Council has not taken an appeal in respect of landscape issues generally nor have they explained why substantial Regional High Value Areas, Landscape Quality or Sensitivity 5, 6 or 7, or even Outstanding, have not been identified in the Proposed District Plan at all. Currently all areas within the General Rural Area, including Regional High Value Areas in the Regional Plan, are treated in the same way as the General Rural Areas. If the Society's suggestions are adopted this could result in differential treatment of these Regional High Value areas depending whether they are contained within the LPR or ECR zones or not.

[9] Curiously Ms Fraser accepted that forestry, including plantation forestry, forms part of the distinctive rural character both of the ECR and the LPR subzones. She intimates that some of the distinctions between the ARC and the District Plan turn on whether the plantation forestry is included. For example, on the east coast, on the northern section, the Regional Policy Statement identifies the beach and seaward waters as outstanding but omits from inclusion the plantation forestry which is covered by the LPR in the Proposed Plan.

Scope of the Court Inquiry

[10] We have concluded that the Court's role on this appeal is to examine which of the various control options in respect of forestry is the most appropriate within the LPR and ECR subzones. To this extent the RPS and maps associated with that are of little or no assistance in identifying the appropriate controls within this area. Given the fact that the two maps are not contiguous and that differential controls would result in terms of the RPS it might be argued that the Court should not consider the Society's appeal because this would create inconsistency in terms of the application of the RPS. However we have concluded that Ms Absolum's view is that the LPR and ECR subzones are sustainable in their own right is correct. Accordingly, it is appropriate for us to consider which controls are most appropriate or better within these subzones in relation to forestry.



Controls Which Can Be Considered

[11] Given the broad nature of the original appeal all parties before the Court accepted that the type of controls that could be considered by the Court ranged from additional standards, possibly relating only to the LPR and ECR subzones, the contents of controlled activity standards and status including restricted discretionary activity status and the range of discretions which might be included. Although full discretionary and non-complying would have been within scope the appellant has reduced the scope of its appeal and these issues are no longer before the Court.

[12] It was also agreed that the better or most appropriate controls under Section 32 of the Act should be the minimum necessary to achieve the outcomes of the Act and the Proposed Plan. Federated Farmers were particularly anxious to note that for farming to remain viable the maximum possible flexibility should be available. Accordingly, any control should be shown to better achieve the objectives and policies of the plan and the Act, than the permitted activity status.

The Proposed Plan Provisions

[13] As a result of council decisions, forestry is permitted within the Rural Area, LPR and ECR zones of the Proposed Plan. Forestry is defined in the Plan Chapter 3 definitions as:

Means the use of land for the planting, tending and the harvesting of trees for commercial gain, including the location and operation of mobile sawmill facilities on a site for no longer than 3 months in the 12-month period, but excludes any other saw milling or timber processing. Refer also to plantation forestry.

[14] All activities in the Rural Zone including forestry are subject to rules (Rule 7.9.4 controlling earthworks, vegetation removal and modification of watercourses). Rule 7.8.3.3 provides a general description of the Landscape Protection Rural zone (LPR). The LPRs comprise two distinct areas:

- (a) on the West Coast, around the Muriwai Beach area;
- (b) on the East Coast the zone is applied to the Mangawhai-Pakiri (J Greenwood Road) coastal strip and related inland area. These areas are



considered to be remote within the context of the Rodney District and contain landscapes that are identified as regionally significant or of outstanding significance.

[15] The Landscape Protection Rural zone provides a higher level of environmental protection than that applied to the East Coast Rural zone.

[16] The focus of the East Coast Rural zone is retaining and enhancing the environment. Within the Landscape Protection Rural zone the focus is on protecting, retaining and enhancing the environment. The provisions applying to the Landscape Protection Rural zone are more restrictive than those applying to the East Coast Rural zone to reflect the greater sensitivity of features and the landscapes within the Landscape Protection Rural zone to the effect of subdivision and land use activities.

[17] From the provisions as a whole we conclude that the core concern of the Council in relation to both zones relates to the potential for subdivision and particularly construction of buildings (residences). This is reflected in the *Explanation and Reasons* to the Policy 7.8.3.2:

... All these values are very sensitive to subdivision and development. Therefore the policies seek to ensure that subdivision, development and land use is undertaken in a manner which retains the functioning of coastal processes, the distinctive landscape and character of these areas, and the water quality of the Te Henga Swamp and stream by controlling earthworks, the clearance of bush, the modification of wetlands and the location of houses.

[18] Permitted activities in all zones are discussed at Rule 7.9.4.1.1 *All Zones*. Interestingly the permitted activities (a), (b), (c) all relate to the removal of trees which are either exotic or part of a plantation of forestry or cropping. Again, Rule 7.9.4.1.5.1 *Permitted Activities* specifically gives permission for:

Permitted Activities

- (a) ...
- (b) The cutting, damaging or destroying of any individual native tree or number of trees constituting native bush, which is
 - (i) less than or equal to 3 metres in height, and
 - (ii) less than or equal to 250m² in area ...

And within the Landscape Protection Rural zone Rule 7.9.4.1.6.1:



Permitted Activities

- (a) ...
- (b) ...
 - (i) than or equal to 3 metres in height and
 - (ii) less than or equal to 500m² in area [*subject to calculation being the maximum area after the 28th of November 2000*].

[19] Excavation or deposition of soil is controlled under Rule 7.9.4.2 *Earthworks* and both the LPR and ECR subzones are included within all zones in allowing activities associated with good farm management practice, construction of farm drains, formation of forestry roads and silage pits as permitted activities. There are excavation and deposition volume controls within the ECR and LPR of less than or equal to 200m³ (except within 10 metres of a wetland or watercourse) compared with 1,000m³ in the General Rural Area.

[20] The modification of a wetland or watercourses have different permitted levels in the LPR and ECR: 100m² for Landscape Protection Rural; 250m² for East Coast Rural; and 500m² for General Rural, as permitted activities. In respect of Native Riparian Vegetation, all zones allow trees to be removed less or equal than 6m in height and removal of native plants regardless of height within the established exotic forest as a consequence of harvesting that exotic forest.

[21] Several conclusions can be reached from these Permitted Activity standards. The greatest of these is that the main difference between General Rural and the others in respect of vegetation and other activities is that smaller areas and volumes of disturbance are permitted within the East Coast Rural and Landscape Protection zones. The second is that there are no particular protections for riparian areas within either the ECR or LPR. This confirms our earlier comment that the plan addresses the major impact on the landscape and visual area as being from construction rather than from farming or forestry activities.

[22] During the course of the hearing the Court queried a number of experts in relation to the ability to remove undergrowth vegetation of whatever height from forestry within 10m of a riparian watercourse. There was a uniform view of witnesses that that was not appropriate, particularly within the LPR or ECR. Largely, the experts agreed that a control over this would be appropriate in any event. We have considered whether it is



possible to control the General Rural area but have concluded that the appeal relates only to LPR and ECR zones.

[23] Accordingly one appropriate control which could be inserted in relation to LPR zones and ECR zones is an additional provision in Rule 7.9.4.4.1, essentially to reword:

Rule 7.9.4.4.1 Permitted Activities: All Zones (except the Okura Policy Area, the Landscape Protection Area, and the East Coast Rural Area)

And accordingly, rewording the other headings to read:

Within the Okura Policy Area, the Landscape Protection Area, and the East Coast Rural Area

...

[24] The wording would remain the same imposing a 10m setback from waterways. Any clearance within 10m would then tend to be a Restricted Discretionary Activity and thus would then apply to forestry as well as any other activities within the area. We understand that the parties including the District Council, Regional Council and the appellant all saw this change as appropriate.

Visual Effects

[25] In order to understand the potential impact of production forestry we must first regard the effects permitted by the settled provisions of the Proposed Plan that can occur within the LPR and ECR zones not subject to this appeal. Firstly, farming activities generally are permitted. Although there are controls over the amount of native vegetation which can be removed, there is no doubt that there is potential within both the LPR and ECR zones for greater intensity of farming.

[26] We are also satisfied that activities within the LPR or ECR zones such as dairying could have significant impacts on both the LPR and ECR. We noted farm development associated with intensification of dairy farming near the north eastern ECR which had essentially removed shelterbelts and residual small patches of exotic and other vegetation. Earthworks have been undertaken and although not evident it may even be possible it was



intended that irrigation would eventually be established. It appeared to us that most of that work would be permitted and accordingly could constitute a significant change even within an LPR or ECR zone.

[27] Although we noticed on many occasions plantation forestry next to or even intermingled with native, this was not as stark as it would have been within other landscape contexts (ie wilding pines in the Hurunui District for example). Here the colour of the exotic forestry largely blends with the native and from a distance it is difficult to discern the native and exotic forestry, at least with areas in pines. This is to be contrasted with the areas which are pasture which show as a brighter green against the darker vegetation.

[28] The Court was divided as to the impact of pasture adjacent to native bush with opinions varying from:

- (a) an idyllic pastoral/native setting, to
- (b) the compartmentalisation of the native vegetation by pasture.

[29] We were however unanimous in our conclusion as to the adverse effect of residences within both the LPR and ECR. Although there were many signs of other structures particularly fences and farming buildings, the curtilage associated with residences made the visual impact significantly greater. To that extent we agree that within the Rodney area buildings and particularly residences constitute a major imposition within both the LPR and ECR areas identified in the plan.

[30] Another major visual effect on which we agreed was the impact of shelterbelts. These are permitted and delineate, alienate, and privatise areas and structures both in the LPR and ECR areas.

Forestry

[31] We saw several examples of forestry clearance where it could be said that this had visual effects on the receiving audience. By comparison, we also saw examples of other farming activities: dairying, ploughing and the like, which also gave similar impressions. We agree that forestry can have significant short-term visual effects when an entire area is cleared. However, it appeared clear to us that the vegetation cover was quick to re-



establish where trees were not replanted. Other plants, both native and exotic, seemed to cover the area quickly. We also noticed that on the edge of existing forestry areas, native undergrowth was quick to establish and create a softening effect for the edge of the forestry farming itself.

[32] Often this is established with quick growing natives such as manuka and kanaka. On a number of occasions we noted how quickly this softened the entire appearance of plantation forestry. This is particularly noticeable in the ECR subzones where the Court noted the stark contrast of lowland (swampy areas) with drains and fencing, next to plantation forestry with native vegetation on its edge. We concluded that the forestry in those circumstances had less impact than the farming paddocks.

Does Forestry Have Impacts that the Proposed Plan Does Not Address?

[33] Our conclusion in this regard is that there are aspects of forestry which do have visual impacts. However, we also recognise that there are other aspects of activities which are permitted activities, particularly farming, which also have visual impacts.

[34] We agree with the Council that the most significant effect is likely to be subdivision and development, particularly with residences. Overall, the impacts from forestry clearance and planting are relatively short-lived. If setbacks from riparian areas can be maintained, which we intend be included in the Plan provisions, this will avoid the worst potential impacts on native vegetation and stream areas. We also consider that an added standard providing for a setback from external boundaries and public roads would also give the opportunity for native undergrowth to establish on the edges and soften the appearance of forestry and even screen it during clearance to some extent.

[35] Beyond these effects we have concluded on balance that any other effects are largely ones recognised in the range of effects anticipated by the various other permitted activities i.e. fences, fence lines, general farming activities, and the like. We acknowledge the general point that farming can have visual effects which derogate from outstanding natural landscapes. Nevertheless, in the context of this Proposed Plan, the objectives and policies identify these activities including forestry as permitted within these areas. Essentially this Proposed Plan takes a relatively liberal approach to such matters and permits a range of farming and other outcomes which might in other circumstances be controlled or restricted.



[36] Given the general nature of the objectives and policies of the other activities which are permitted, we cannot find that there is anything in the RPS or Plans, or the Act, which would constrain the Council in respect of forestry in the circumstances of this appeal.

[37] We consider that the additional effects of forestry in the LPR and ECR subzones could be addressed by imposing an additional standard relating to the setback from riparian waterways and also a 10m setback from public roads and external boundaries. The intention of this is to give the opportunity for native forestry to develop in the setback. However, we wish the parties to have an opportunity to consider the wording of this provision and whether 5m or 10m is more appropriate, given the potential for weed species to also grow.

The More Appropriate Provision

[38] Having reached this point, we now examine the proposal against the various provisions of the Act, including Section 32 and otherwise. Firstly, we have already held that the Plan provisions are clearly not inconsistent with, and in our view gives effect to, the RPS and relevant regional plans.

[39] Accordingly we have no particular problem with concluding also that the Proposed Plan provisions give effect to the New Zealand Coastal Policy Statement and to Sections 7 and 8 of the Hauraki Gulf Marine Park Act.

[40] Overall, we consider that the provisions in the Proposed Plan with the amendments we have discussed can be considered as achieving and implementing the objectives and policies in the Proposed Plan. A similar conclusion follows for the EDS proposal which is largely similar to the Plan provisions. In reaching the conclusion as to whether or not greater control is more appropriate or better as discussed by the EDS, we consider which provision assists the territorial authority to carry out its functions in order to achieve the purpose of the Act.

[41] In this regard we note that the Plan itself recognises the potential for change within the Rural Area, particularly in relation to farming practices. Section 4.5.2.2 of the Plan discusses the protection and enhancement of rural character and rural amenity values. In particular it notes:



... the rules recognise that the rural area is also a productive area used for business activity in the form of primary production and related activities ...

[42] In 7.1 *Introduction* to the Rural Area, it is noted:

The Rural Area has a dynamic nature. Rural activity has rarely stood still for long. It is marked by constant change ...

[43] In 7.2.1 *Agriculture and Farming*:

The economics of rural production continue to change ...

And later, *Adverse effects*:

Providing for the dynamic nature of the rural area and at the same time avoiding adverse effects on the essential elements of rural character ...

[44] We agree with Ms Carruthers' submission for the District Council that the Plan seeks to encourage and not limit farming, horticulture and forestry. On the other hand, it seeks to avoid more intensive and non-rural activities. Accordingly, we have concluded that the Council provision with the amendments we have discussed will better enable the Council to undertake its activities of encouraging rural activities (including forestry) with the minimum necessary constraints than the EDS provisions. In this regard the permitted activity standards achieve these outcomes without any cost imposition upon the farming community.

Carbon

[45] Primary productivity must be a key component of sustainable management. The issue in this case is whether forestry is properly seen as part of that primary production. In this regard, we note that recent climate change and emissions trading schemes have brought the question of carbon sequestration to the forefront of public thinking. In this regard we cannot discount forestry as an appropriate primary activity which has the ability to sequester carbon dioxide, at least in the medium term.

[46] Depending on the level of emissions trading this may place a particular value on forestry in the medium term to achieve the objectives and policies of the plan. To that end, we have already concluded that the Plan focuses on the question of rural character



and rural amenity. In this regard it is very much focussed upon farming, horticulture and forestry. It is particularly concerned with other potential activities on these core activities within the Rural Area. It sees these other activities as derogating from the character derived from the rural activities. Accordingly, it follows that we must conclude that the council's provisions better meets the objectives and policies of the Plan in promoting forestry.

Efficiency and Effectiveness of the Provision

[47] The EDS proposal as revised does not have significant impact. Given most of the forestry is already existing and there has been little planting in the last 5 years, it might be argued that its impact is likely to be minimal. Carbon sequestration is one possible example. Where it may impact is if mass planting of forestry becomes popular. Then the EDS rule itself may impose a barrier to larger plantations. In this regard the decision of EDS to allow development up to 10ha, but not larger, did seem to us to be curious.

[48] For our part the effect of smaller plantations, sometimes referred to as a pocket handkerchiefs within pasture land, has more visual effect than the larger areas which cover an entire hillside or ridge. More visual effect is often derived from a sharp contrast between pasture and forestry than where the forestry covers either the entire area or meets up with native vegetation. Overall we conclude that either provision is likely to be similar in its efficiency and effectiveness but by a minor margin we consider that the Council provision with the amendments we have discussed is better.

Benefits and Costs

[49] The question is whether or not the EDS rules are likely to impose a barrier to investment in forestry if that is otherwise appropriate. There was some evidence given which showed that the economics of forestry at the current time were already finely balanced. The difficulty with some of the EDS proposal is, what is precisely required in a management plan? If detailed expert advice was required there is a prospect of significant expense being incurred for little gain. On the other hand, if the provision was applied liberally, then the work may be able to undertaken by the farmer at little or no cost. Overall, again we consider this matter is relatively evenly balanced but conclude that the Council provision is better because it avoids the necessity of a consent and the



uncertainty that this might create in the minds of the farming community. We agree however that any barrier is likely to be more perceived than real.

Part 2 of the Act

[50] We agree with Mr Gardner the Plan provisions require that farming and forestry should be provided for within the Rural Area. The *Explanation and Reasons* to Section 7.5 *Strategy* of the Plan states:

The strategy looks at providing for general rural activities, such as farming and forestry, which are part of the rural character and amenity values within the majority of the District.

[51] On this basis we agree that the plan sees forestry as part of the general rural character and amenity of the area and accordingly, to be protected and enhanced in terms of Strategy 7.5(a). Accordingly, we agree that there is no reason given in the Plan to treat forestry differently from horticulture or farming; they are all primary production activities that need to be protected and enabled in the Rural zone. We agree that the imposition of a changed status for larger blocks (over 10ha) as controlled (with management plan, or restricted discretionary, without) would be to take one aspect of this primary productivity and potentially add, not only the costs of compliance, but also, potentially to discourage the very activity which the plan seeks to enable and protect.

[52] Given that the objective of Part 2 of the Act is to achieve sustainable management, we conclude that the objectives and policies of the Plan are best met by provisions which protect and enable forestry as far as is possible while meeting other parts of Section 5, particularly by avoiding, remedying or mitigating adverse effects.

Outcome

[53] We consider that with the addition of two additional standards: one relating to riparian margins, the other relating to setback from roads or external boundaries, the Council provision would properly enable and protect that rural activity while at the same time avoiding, remedying or mitigating adverse effects.

[54] Whilst the EDS provisions would also meet Part 2 of the Act, they are more restrictive than the council's provisions. We conclude that the council's provisions better enable the primary production in the Rural zone while adequately avoiding, remedying,




or mitigating effects. Although the EDS provisions would also do so, we conclude that the EDS provisions would not achieve and implement the council's policy of enabling forestry to the same extent.

[55] Accordingly, save for the minor amendments we have discussed, we would dismiss the appeal. We wish to give the Council and the other parties an opportunity to consider the final wording to be inserted within the Plan and accordingly direct that:

- (a) the Council is to forward to the other parties, within 20 working days, wording in respect of the proposed standards to be inserted within the plan;
- (b) the parties then have 10 working days to respond;
- (c) if agreement cannot be reached the Council is to file a memorandum with its proposed provisions within 10 working days thereafter, and all other parties within 10 further working days.

[56] This does not appear to be a case where costs are appropriate and we do not understand any party to be seeking costs.

DATED at Auckland this 11th day of November 2009



J A Smith
Environment Judge

