BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 216

IN THE MATTER	of an appeal under Section 120 of the Resource Management Act 1991 (the Act)
BETWEEN	J. HEMI (HOHUA WARREN HEMI) (ENV-2006-AKL-000688)
	Appellant
AND	WAIKATO DISTRICT COUNCIL
	Respondent
AND	H. RITCHIE
	Section 274 Party
	A. GREENSILL
	Section 274 Party

Hearing:	Hamilton on 4th – 5th, 8th – 12th March 2010
Court:	Environment Judge M Harland
	Environment Commissioner M P Oliver
	Environment Commissioner W R Howie
Appearances:	P Lang for the appellant
	L Muldowney for respondent
	A Sykes and J Pou (11th – 12th March 2010) for A Greensill
	Dr H Ritchie for herself

DECISION

A. The appeal is allowed.

B. The resource consent to build a dwelling on CT SA30B/414 South Auckland Registry as per the plans submitted by James White identified as Set E is allowed subject to fixing the final conditions as required by the reasons for this decision.

C. The appellant must:

a. consult with the Waikato District Council, Ms Greensill and Dr Ritchie about the proposed conditions; and

b. lodge and serve amended conditions including all volunteered and/or agreed changes within 20 working days of this decision and

D. Any party who wishes to be heard on the document served under order C must lodge and serve a notice to that effect specifying:

a. what changes they want made to make the document implement this decision; and

b. the reasons for the changes, within a further 5 working days of the receipt of the document in C above.

E. Costs are reserved.

REASONS FOR DECISION

Introduction

[1] After having lived overseas in Japan for a number of years, Mr Hemi wishes to return to New Zealand to live with his wife and two young children at Whaingaroa/Raglan. The Hemi Te Whanau Trust owns a piece of land at Te Whaanga ("the Hemi Land") to which Mr Hemi has ancestral and personal links. Mr Hemi wishes to build a family home on this land which is located on the landward side of an in-filled

boulder spit. The crest of the spit lowers towards the east where a lagoon occurs, into which waves enter. Mt Karioi looms up from behind the site. The ocean beyond the boulder beach and the spit forms the well-known "Indicators" surf break. The landscape in which the site is located has been described as recognisable and memorable.

[2] In terms of the then Operative Waikato District Plan and the now Proposed Waikato District Plan, Mr Hemi needs a resource consent for his new home because it is a non-complying activity. His proposal accordingly needs to be considered by the Court under Section 104D of the RMA, and if the gateway test is met, then the provisions of Section 104 of the RMA apply.

[3] The Waikato District Council's regulatory committee heard Mr Hemi's application for resource consent in December 2005. In its decision dated January 2006, the committee declined consent based solely on the fact that it considered there to be an unacceptable risk of coastal inundation. It is from this decision that Mr Hemi now appeals. In this Court he is now supported by the Waikato District Council and Ms Greensill, but Dr Helen Ritchie opposes.

[4] The actual and potential environmental effects of the proposal are effects associated with coastal hazard, the existing ecology of the site and the impact on natural character, landscape and amenity values. Cultural effects also need to be considered, as in this case there is a dispute between hapu as to whether or not a building is appropriate on the site at all. In addition Mr Hemi and Ms Greensill contend that there are positive cultural effects which flow from the proposal because a presence on the site will enable kaitiakitanga to be exercised more readily. It also enables the Hemi family to establish a homestead on the site.

The General Area

[5] The Whaingaroa/Raglan is rich in cultural history. It is also an important place for surfers from New Zealand and around the world. The surf breaks are internationally renowned and some members of the community have sought to capitalise and expose the

area to greater commercial activity and development because of this. To the south west of the Raglan Township is the small coastal settlement of Whale Bay. This area is also known as the Calvert Road subdivision and is described as suburban in character. To the west of Whale Bay is the lagoon that is at the eastern side of the Hemi land. Tangata whenua and those who respect their connection with it, refer to this area as Te Whaanga, which the Court was told means "the Bay". Recent history reveals that the land in this area comprised bush and farmland.

[6] Te Whaanga is a place of considerable cultural significance to the Tainui iwi, not only to the local hapu of Ngati Koata and Ngati Te Ikaunahi, but also to various inland Tainui hapu. Mr Hemi includes Ngati Koata as one of his tribal affiliations and traces his whakapapa back to those who have original and strong links to Te Whaanga generally.

[7] The Hemi land is part of a larger certificate of title comprising 3.4842ha in which the Hemi land comprises a 1/3 share of 7,539m^2. The remaining 2/3 share is owned by the late Professor James Ritchie and Professor Jane Ritchie, Dr Helen Ritchie's parents ("the Ritchie land"). Two dwellings are situated on the Ritchie land, the home of Professors' Ritchie and a smaller home referred to as "the cottage" and occupied by Dr Helen Ritchie while she completes building her house on her land further up Whaanga Road.

[8] The Ritchie land and the Hemi land are subject to a cross-lease[1] and clearly abut one another. The cross lease contains an agreement that a house can be built on the Hemi land. The agreement is subject to the relevant planning provisions which under the ODP and PDP make it a non-complying activity.

[9] The Hemi land comprises the area closest to the coastline and is largely flat land adjoining the coastal esplanade reserve. The landform of the Hemi site and surrounds is distinctive because of the combination of the boulder beach facing the Tasman Sea in which the well-known Indicator Surf Break is located, and the indented Whale Bay lagoon with its small active stream mouth, but the landform is not a feature of geological

[1] Attachment 8: Evidence- in- Chief Appellant.

significance. The Ritchie land comprises seaward facing coastal slopes covered with some regenerating indigenous vegetation.

[10] Looking from the sea, the small coastal settlement of Whale Bay is to the west of the lagoon, and around the lagoon inlet and further to the east there is less housing. From the sea the landscape near the Hemi Land contains three houses: the Banks house, the Ritchie house, and Dr Helen Ritchie's house which is still being built and is further up Whaanga Road. All of these houses are quite visible from the sea despite being surrounded by regenerating indigenous vegetation, and in the case of Dr Helen Ritchie's house, indigenous vegetation which is more slowly regenerating from farmland.

[11] All of the land in the immediate vicinity is privately owned and access to the lagoon and boulder beach is gained by the public (mostly the surfing community) walking around the boulder beach from Whale Bay. There is a coastal esplanade reserve which runs across the front of the Hemi land on the seaward side. There is a steep and narrow private driveway to the lagoon area from the Hemi and Ritchie land which the owners have allowed to be used by those who have ancestral links to the land and some others.

The People and Recent History of Ownership of the Land

[12] Mr Hemi was brought up and educated in Hamilton. Most of his immediate family still live in the Waikato region. As a child, Mr Hemi and his family camped on the piece of land which the Trust now owns, which was then owned by Clarence Te Puke and his wife Caryl. Mr Hemi refers to the late Mr and Mrs Te Puke as his Uncle and Aunt. At that time Mr and Mrs Te Puke owned the Ritchie land and the Hemi land. Mr Hemi recalls the Hemi land being free of scrub or bush, but covered in thick grass and lilies, upon which another Uncle who was a neighbour, grazed his cattle.

[13] During Mr Hemi's childhood years, a humble but well-used bach was situated on the Hemi land. It was destroyed by fire some time in the late 1970's or early 1980's. Mr

Hemi remembers making a promise to himself and his whanau at this time that he would rebuild the bach one day.

[14] In 1983 Clarence Te Puke sold off part of his interest in the land which in 1990 was purchased by the late Professor James Ritchie and his wife Professor Jane Ritchie. After the death of Clarence Te Puke in 1992, Caryl Te Puke approached Mr Hemi and asked him if he wished to buy the land upon which the bach had been situated. The end result was that in 1997 an agreement was reached that the Trust would purchase the land, although the title records that the legal transfer for some reason did not occur until 2004.

[15] Dr Ritchie also has strong links to the Te Whaanga area. She spent childhood holidays at Te Whaanga and for some years she has called it her home. Mr Wiremu Puke supports Dr Ritchie's opposition to the proposal. As well, he represents some members of the Puke whanau, although neither Mr Puke nor the whanau members who support him are actual parties to these proceedings. Mr Puke's hapu is Ngati Mahara an inland hapu of Tainui. He is the son of the late Hare Puke who was an influential and important kaumatua in Tainui. Mr Wiremu Puke can also trace his whakapapa back to Te Whaanga. He also is related to the late Clarence and Caryl Te Puke. Generally speaking his and his supporters view is that for cultural reasons, it is not appropriate for a house to be built on the Hemi land at all.

[16] Ms Greensill grew up in Whaingaroa and through her mother claims direct descendancy to the original people of Te Whaanga. She appears in the proceedings in three capacities:

a) As a spokesperson for a number of local hapu, one of which Ngati Koata is accepted as having an ancestral connection with the land;

b) As the Secretary of the Tainui Awhiro Management Committee ("Tainui Awhiro") which is an environmental management committee recognised by the Waikato Raupatu Lands Trust, the Waikato District Council pursuant to Section 35A of the RMA and by Te Puni Kokiri as a

representative organisation that holds the mandate to represent the specific kinship groups, hapu and iwi on RMA matters in the Whaingaroa area.

c) As a trustee of a local trust which is an adjoining landowner.

The Proposal

[17] Originally, the house Mr Hemi proposed to build was large and ostentatious. Not surprisingly, his proposal attracted much interest in the local community. The proposal now before the Court is to build a one level 3 bedroom house with a floor area of 259m^2, that will be slightly elevated to address it is said any concerns about coastal inundation, but not so elevated as to be visually dominant in the landscape. The house will be 7.9m high at its top point and will be built to the back of the land close to the access way and the foot of the hill. In this way it is said the house will assume a lack of prominence in relation to the boulder beach and the bush-clad slopes behind it. The proposal provides for vehicle access to the Hemi land to be to the rear of the house. The design proposal of the house incorporates cultural elements with a maihi or carved entry gable at the south entrance near the access way and a smaller maihi to the north facing the boulder beach.

[18] It is proposed that the house will be self-sufficient in terms of water, power and other services. Solar energy is to be employed, supported by a bio-diesel backup motor, and the sewer system relies not only on soil drainage, but allows clean re-cycled run-off to be absorbed by drip-feeding an irrigation field.

[19] Just before the hearing, the configuration of the house on the site was moved 6m further away from the lagoon to reduce the area of vegetation that would need to be removed for the construction of the house. The proposal as it now stands will require 600m^2 of 20 – 30 year old low mahoe forest to be removed, whereas previously 715m^2 would have been affected. The 600m^2 equates to one quarter of the existing vegetation which the ecologists have categorised as significant, because of its link to the Mt Karioi coastal vegetation sequence. A full Landscape Plan and Revegetation Plan are submitted as part of the proposal to mitigate the effects of the loss of the vegetation during

construction. It is proposed to restore and maintain six times (or 4,320m^2) the amount of vegetation lost and to replace exotic vegetation with locally genetically sourced species of plant. It is accepted that this will take some years and effort to establish and maintain, because the land is so close to the sea.

[20] The design also incorporates a small garden area, and salt-water pool, which it is proposed will be completely screened by existing vegetation. The proposed lawns and gardens are in total 100m^2 and are not square or straight-lined, but closely follow the front footprint of the house and aim to integrate them into the retained vegetation.

[21] The proposal also provides a camping and picnic area of approximately 400m2 near the boulder beach, so that those with ancestral links to the land can, despite its private ownership, continue to enjoy camping there and using it as a base for gathering kaimoana.

Relevant Planning Instruments

[22] As already outlined, the activity status for this application is non-complying under both the Operative Waikato District Plan ("ODP") and the Proposed Waikato District Plan ("PDP"). Under the ODP the land is located within the Rural Zone with overlays of a Coastal Policy Area, a Natural Conservation Area, and Hill Country Policy Area. The proposal is non-complying because the plan only permits one dwelling per certificate of title.

[23] The PDP was notified on 25 September 2004. All of the appeals in relation to the PDP which might affect this proposal have been resolved. Accordingly the PDP provisions relevant to the Hemi land are dominant. Under the PDP the proposed activity is located in the Coastal Zone within the Whaanga Coast Policy Area. The proposal is non-complying under the PDP because the house is to be setback 70m from MHWS, whereas Rule 26.49A, requires buildings to be setback 100m from MHWS.

[24] Other relevant planning documents that need to be considered are the Waikato Regional Policy Statement ("the RPS") and the New Zealand Coastal Policy Statement ("the NZCPS"). Under the RPS the relevant policies are those which relate to Maori culture and traditions and the promotion and provision for kaitiakitanga[2]and Appendix 3 which outlines the criteria for determining significant indigenous vegetation. Chapters 2 and 3 of the NZCPS also must be considered. Submissions and evidence referred to the Proposed New Zealand Coastal Policy Statement, but at this time it has no legal effect and cannot specifically be taken into account by us.

[25] The specific provisions of the district plan, the RPS and the NZCPS will be discussed under each particular issue relevant to this appeal.

Statutory Framework

The Gateway Test

[26] As an application for a non-complying activity, the application must first meet what has become known as the *"gateway test"* under Section 104D(1). This requires the Court to only grant consent for a non-complying activity if it is satisfied that either:

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

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

[27] In order to assess the magnitude of adverse effects under Section 104D(1), the Court must consider the effects of the activity on the environment as a whole.

[28] The term *"minor"* has been accepted as meaning *"lesser or comparatively smaller in size or importance"*[3]. In ***Bayley v Manukau City Council***[4], the Court of Appeal confirmed that the appropriate comparison of the activity for which consent is sought, is with either what is lawfully being done on the land, or could be done there as

[2] Paragraph 2.1.5 RPS: Policies 1 and 2
[3] Bethwaite v Christchurch CC 085/93.
[4] [1999] 1NZLR 568 at [576]

of right. Currently, under the permitted baseline, the site could be used to erect a small farm shed near the access way, and/or fencing could be erected on the site in areas where there is no possibility of indigenous vegetation being cleared.

Section 104 Test

[29] If the gateway test has been met then the appellant still has to satisfy the Court that the application should be granted, bearing in mind the matters referred to in Section 104(1) and in terms of the Court's overall discretion.

[30] Regard must be had to any actual and potential effects on the environment, including those that are more than minimal. This is a different test from the assessment of effects under the gateway test which is a broad or high level filter test[5]. The test of effects under Section 104(1) (a) involves a more detailed assessment. We must also have regard to the planning instruments referred to in Section 104(1) (b) (iv) (v) and (vi).

[31] It is also important to consider the integrity of the planning documents and the aspects of precedent effect. In the context of this case, the argument by Dr Ritchie is that allowing a house to be built on this site where it is categorised as a non-complying activity would both undermine the integrity of the PDP provisions as they relate to the building setback requirement and would also have a precedent effect of allowing further dwellings to be built in the coastal environment.

[32] The overarching requirement is for the proposal to meet the purpose and principles of the RMA as outlined in Part 2. In this case we will focus particularly on the relevant provisions in Part 2 which include sections 5, 6(a) (b) (c) (e) and s7. Each of these provisions will be considered in the context of the issues relevant to the proposal.

[33] Because of the nature of our enquiry, the best way to deal with all of the planning and legislative criteria is to deal with them in the context of the specific issues raised by the proposal rather than to conduct the assessment under the umbrella of the gateway test and then Section 104, which could involve unnecessary repetition. The effects we need to consider are those relating to:

- coastal hazard;

[5] Para [24] ***Foster and Ors v Rodney District Council***, A123/2009

- the ecology of the site;
- natural character, landscape and amenity values;
- cultural values.

We will then consider whether the proposal is consistent with the overall purpose of the Act as set out in Section 5.

Coastal Hazard

Statutory Provisions and Planning Instruments

The NZCPS

[34] There are a number of provisions in the NZCPS which apply.

[35] Policy 3.3 of the NZCPS requires the adoption of a precautionary approach to activities with unknown but potentially significant adverse effects. Policy 3.3.1 provides:

> Because there is a relative lack of understanding about coastal processes and the effects of activities on coastal processes, a precautionary approach should be adopted towards proposed activities, particularly those where the effects are as yet unknown or little understood. The provisions of the Act which authorize the classification of activities into those that are permitted, controlled, discretionary, non-complying or prohibited allow for that approach.

[36] As can be seen, Policy 3.3.1 of the NZCPS refers to a precautionary approach being taken to the effects of activities on coastal processes. We agree with the submissions of the appellant that the precautionary approach relates to the effect of activities, not the effect of coastal hazard on those activities.

[37] Section 3.4 of the NZCPS is entitled "Recognition of Natural Hazards and Provisions for Avoiding or Mitigating their Effects". Relevant to this proposal under this heading are policies 3.4.4 and 3.4.5 which provide:

> **Policy 3.4.4** In relation to future subdivision, use and development, policy statements and plans should recognize that some natural features may migrate inland as the result of dynamic coastal processes (including sea level rise).

> **Policy 3.4.5** New subdivision, use and development should be so located and designed that the need for hazard protection works is avoided.

PDP Provisions

[38] Chapter 5 deals with natural hazards. Objective 5.2.1 requires:

> Risks from natural hazards to health, safety and property, resulting from use, development or protection of land are minimized.

[39] The relevant policy is Policy 5.2.4. It provides:

> Construction ... of a building should not take place on land that in the event of a 0.5 metre sea-level rise would be:
> (a) below mean high water springs, or
> (b) subject to inundation by storm surges, or
> (c) subject to coastal erosion.

[40] In addition, Policy 5.2.2 provides that the:

> ... development ... of land subject to natural hazards should be avoided unless the related risks to health, safety and property are mitigated.

[41] The Plan contains reasons and explanations, which place emphasis on avoiding development in hazard prone areas rather than attempting to mitigate the effects. The reason for this is that hazard events are not always able to be controlled or predicted (Policy 5.3.2). A specific policy, 5.3.4, deals with coastal erosion and storm events. Again, there is a preference for avoidance over mitigation and cross-reference to NZCPS Policy 3.4.5 to which we have already referred. The condition precedent to the need to avoid however is that there is a hazard identifiable.

[42] Policy 5.2.9 provides that development should be designed and located to avoid or mitigate the predicted effects of global climate change on natural hazards, especially increased flooding, erosion, fire and storms. The submission by Dr Ritchie is that a precautionary approach is required given that the scientific knowledge in relation to climate change or natural hazard arising from it is incomplete. The submission by the

appellant is that the proposal is in fact designed and located to meet the concerns outlined in Policy 5.2.9.

[43] One method by which the policies outlined in the PDP are implemented in the context of this case is by Rule 26.49A which relates to coastal building setbacks. In this case the building setback cannot comply with the requirement that it be 100m from MHWS, but it is able to be set back 70m from MHWS. It was Mr Matheson's evidence that there was no basis to the 100m line adopted in the PDP. In many senses it can be said to be an arbitrary number and non compliance serves to trigger a site specific assessment of these matters. He notes, for example, that 100 metres up an 80m high cliff is quite different to 100 metres on a flat sandy coast.[6]

The Issues and the Evidence

[44] There are two areas of coastal hazard which arise in this case; the risk of coastal inundation from the ocean and the lagoon, and the risk of lagoon edge erosion.

[45] It is also important however to identify that the only potential effects of the proposal that may add to the risks posed by coastal hazard are:

a) the risk that the dwelling might eventually be damaged or become unusable as a result of inundation or erosion, in which case removal might become necessary to avoid effects on natural character, landscape or visual amenity; and

b) the risk to personal safety if someone should be present on an inundated part of the site during an exceptional storm.

Mr Hemi's case is that these risks are so low and would arise so far in the future that they are potential effects that need not be dealt with at the present time other than through appropriate review conditions attached to the consent.

[46] The original application by Mr Hemi did not include any assessment of coastal hazard, and Mr Jim Dahm was engaged by WDC to provide comment on this matter.

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[6] Transcript page 301.

The preliminary assessment[7] prepared by Mr Dahm suggested that the then proposed house site might be affected by wave flooding or inundation from the sea and the lagoon. It also noted potential concerns about the impact on the site of coastal erosion.

[47] Dr Roger Shand was subsequently engaged by the applicant to address the concerns raised in Mr Dahm's report. Dr Shand prepared an initial assessment in October 2005 and then more detailed work was undertaken by him before the reconvened council hearing in December 2005.[8] The Hearings Committee considered the issue of coastal hazard to be significant. The committee declined the application particularly because in its opinion the proposal ran contrary to Policy 3.4.5 of the NZCPS.

[48] After receiving the Council's decision to decline consent, Mr Hemi engaged Dr Shand to provide a detailed inundation hazard assessment with site-specific monitoring and hydrodynamic modelling in relation to the Hemi land. Mr Dahm has reviewed and analysed the further assessment completed by Dr Shand. Both experts have concluded that there were a number of material errors in Dr Shand's original assessment put before the Council hearing. In particular, the mean sea level ("MSL") was over-estimated by approximately 0.8m. Part of the sea level rise ("SLR") value adopted was effectively double-counted in the calculations applied to the house design by Mr White, Mr Hemi's design consultant. Both Dr Shand and Mr Dahm agreed that the risk of inundation once re-calculated was sufficiently low so as to no longer be an impediment to the grant of consent.

[49] In order to properly peer review this critical point, WDC engaged Dr Shaw Mead to review Dr Shand's and Mr Dahm's assessments. Dr Mead confirms that the re-assessment of the coastal inundation risk is accurate and precautionary.

[50] Dr Ritchie engaged Professor Manning to review the evidence presented by Dr Shand, Mr Dahm, and peer reviewed by Dr Mead. Professor Manning's input,

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[7] *Preliminary Assessment of Coastal Hazards September 2005*, Attachment 1, Brief of Evidence, Jim Dahm, 14 August 2009

[8] Attachments 1A and B, Brief of Evidence, Dr Shand

particularly as it relates to the SLR value to be adopted, now forms an important part of the evidence.

[51] Just prior to the hearing Dr Ritchie was granted leave to produce evidence about more recent storm events which caused erosion to the land on the lagoon side. These photographs, and data obtained by Dr Shand concerning those events, have also been considered by us.

Coastal Inundation from the Ocean and the Lagoon

[52] It is important to note that those with the longest local knowledge do not recall the proposed building site to have ever been inundated either from the sea over the boulder beach, or from the lagoon even in the most severe storms. The period of Dr Shand's assessment adds to these observations and in particular, includes detailed assessments of the effects of severe storms in September 2005 and in October 2009.

[53] It is agreed that the highest risk of inundation is from the lagoon or eastern direction. We therefore do not spend any significant time assessing the risk of inundation from the sea over the boulder beach, as Dr Ritchie's case does not place significant emphasis on this. It seems to have been accepted that given the roughness of the Hemi land and past events, even with predicted SLR estimates there is little risk of inundation from the ocean over the boulder bank to the proposed building site.

[54] Dr Ritchie however challenges the risk of inundation from the lagoon. Whilst having no specific scientific evidence to support her assertions, Dr Ritchie relies more generally on the uncertainty of the various factors involved in the assessment of SLR and the likely prediction of more frequent and intense storms as a result of climate change. Dr Ritchie's basic thesis is that there is more unknown than there is known, therefore any attempt to assess risk in this area must take an extremely precautionary approach. This, Dr Ritchie submits, is supported by the PDP provision requiring the building setback to be 100m from MHWS.

Sea Level Rise

[55] Professor Manning's evidence sets out recent advances in international scientific research relevant to SLR values in response to climate change and comments on the scientific information underlying the recent Ministry for the Environment Guidance Manual[9] and the 2007 IPCC assessment report in which Professor Manning had a major role.

[56] The experts recognise that the science of SLR is characterised by potentially large changes and significant uncertainties which must be reflected in future coastal management. Despite this, significant agreement[10] has been achieved between them regarding the value which should be attributed to this site for SLR.

[57] Whilst acknowledging that the topic is complex and still under development, the experts agree that out to the decade 2090-2100, SLR values between 1.5m and 2m cannot be ruled out, but their view is that the available evidence justifies an estimate of between 0.5m and 1.5m for SLR be adopted generally.[11] Whilst accepting that it is a question of policy or judgment, they suggest:

a) the upper SLR estimate should apply to particularly expensive investments with high public welfare and benefit and with no hazard adaptation options, because hazard failure would have major catastrophic consequences. In this category they include as an example, items of major infrastructure such as new highways or large subdivisions, where economic losses and other consequences could be severe in the longer term, where there is minimal opportunity for subsequent adaptation and where existing policy emphasizes hazard avoidance. For these types of uses they suggest that consideration of potential SLR over a longer time-span may also be appropriate;

b) the lower SLR estimate should apply to investments of limited value where personal safety is not an issue and viable adaptation options are

[9] Ministry for the Environment 2008 *Coastal Hazards and Climate Change. A Guidance Manual for Local Government in New Zealand* 2nd Edition July 2008

[10] Caucus statement 19 Oct 2009 signed by Dr Shand, Mr Dahm, Dr Mead, Professor Manning

[11] Ibid, para [3][i]

available. This is because hazard failure would have minor to insignificant consequences;

c) deciding on an appropriate SLR value to apply for a particular use needs to be based on a robust risk assessment analysis that balances the likelihood and magnitude of the potential hazard impact against different SLR scenarios.[12]

[58] In respect of this particular site the experts agree that the proposed dwelling would be of *"relatively low to moderate value and present minimal personal risk"*. In the supporting material they were prepared to say there was "*virtually no chance of personal risk*". Accordingly, they agree that on a hazard analysis using a 1% AEP (100 year return period storm), the site was very unlikely to be affected by an SLR of 0.6m and unlikely to be affected by a rise of 0.9m confirming in their agreed caucusing statement *"we consider these values are appropriate given the magnitude of potential impacts"*.[13] There was some dispute about what the experts meant in reference to *"the site"*. Dr Shand believed the reference was to the *"building site"*, but Mr Dahm believed that it referred to the *"land that would be affected, not the building"*. Nonetheless there was agreement that the hazard projections already used by Dr Shand show low to very low risk for SLR of 0.6 to 0.9m over 100 years and that these are the appropriate values to be used for SLR in this case.

[59] For practical purposes this means that in this case if 0.6m was the base SLR estimate, the predicted 1% AEP (100 year return period storm) level would be 0.5m below the floor level of the basement and 1.4m below the living area floor level. If 0.9m was the SLR estimate, then the level would be 0.2m below the floor level of the basement and 1.1m below the living area floor level. Even if the figures were reworked on an estimate of 1.5m SLR, then the water level would be only 0.4m deep in the basement (that is knee deep water), and 0.5m below any of the living area floor levels. As well, it must be remembered that these calculations apply during the highest pulses of water from the lagoon at the peak of the tide and storm and are therefore not constant.

[60] The experts agree that the appellant is likely to obtain several decades of use before removal would be required even if the most severe climate change and SLR

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[12] Ibid, para [3][iii]
[13] Ibid, para [3][iv]

scenario occurred. This is said to lower the level of risk and provide for viable hazard management in the longer term. It is agreed that if SLR or other hazard driver effects were found to be underestimated, viable adaptation options are available in this case. There was an acknowledgement that *"strategic withdrawal"* was not feasible given the steep adjacent topography, but removal is said to be feasible in the event that more severe SLR occurs.[14]

[61] Dr Shand, Mr Dahm and Dr Mead however are agreed that Dr Shand's risk assessment is extremely conservative and all are therefore confident in their expert opinion given to the Court that the actual risk of inundation to the proposed building site from either the seaward side or the lagoon side of the site is extremely remote.

Evaluation of the Risk of Inundation

[62] We agree that a balanced approach to the issue of the range of SLR value to be adopted in any given case is required, because of the current scientific uncertainties surrounding the topic and the rate at which scientific knowledge is developing in this area. We also agree that a precautionary approach is required. We see sense and adopt the suggestion of the experts that the value of the investment at issue coupled with an assessment of personal risk and an assessment of the options for dealing with the development if predictions prove to be worse than expected, is a good basis for considering the value to be attached to SLR in any given case.

[63] In this case we agree with the experts that a SLR value of 0.6m to 0.9m should be adopted for this site. We interpret the *"site"* to mean the proposed building site. We have referred to the practical effect of a SLR value of 0.6m to 0.9m. The worst case scenario on the expert evidence establishes that inundation would be 0.2m below the floor level of the basement and 1.1m below the living area floor level. Even on an SLR value of 1.5m, the basement would only be temporarily inundated by knee-deep water and it would not reach the living area floor levels. We are satisfied having carefully reviewed the expert evidence, that the risk of coastal inundation to the building site is acceptable.

[64] We are grateful to the experts involved for their careful and responsible approach to the difficult issue of SLR.

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[14] Ibid, para [3][v]

Lagoon Edge Erosion

The Evidence

[65] More problematic, Dr Ritchie submits, is the question of lagoon edge erosion caused by floods from the stream entering the lagoon. It is important to note that this is not erosion on the coast caused by sea conditions. Whilst acknowledging that the house site has now been moved a further 6m from the lagoon to the west of the site, Dr Ritchie maintains that this is still an issue which could result in a risk that is more than minor. Dr Ritchie identifies that expert caucusing did not cover the issue of coastal erosion but rather focussed on the possibility of inundation or flooding. Dr Ritchie refers to Dr Shand's original assessment which estimated that coastal erosion could come to within 6.8m of the proposed building site. Given the increased agreed position on the value to be attached to SLR, Dr Ritchie identifies that there is now a potential of coastal erosion to within 10.7m of the dwelling site. This, she points out, is at the level of 0.9m, but she identifies that no further analysis of effects has been done, should the new upper range of SLR of 1.5m eventuate.

[66] Dr Shand was cross-examined relatively extensively on this issue. His position remained that he was confident erosion would not threaten the house site in the next 100 years. He based his opinion largely on the geomorphology of the building site which had revealed that it was comprised of silt-clay soils as opposed to sand. Mr Dahm in cross-examination provided more conservative answers and whilst acknowledging Dr Shand's evidence about the likely geomorphology of the building site, preferred to reserve his judgment until actual cross-sections of the building site had been obtained. Mr Dahm acknowledged that the dynamics of the lagoon posed *"significant uncertainties and a potential for serious erosion of the sand flats from the lagoon side"*.[15] But nonetheless, his view was that there was a low risk of the eroding coastline reaching the house in the next 50 – 60 years.

[67] Dr Ritchie submits that the erosion caused by the October 2009 rain storm to the lagoon side of the Hemi land is evidence which supports the concerns she identifies. Dr Shand gave additional rebuttal evidence to the Court in respect of this topic. His research has revealed that on 5th October 2009, 50.1mm of rain fell in 24 hours. He used the records from Karioi weather station to obtain this information. He further was able to say

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[15] Paragraph [78]

that such events occur 1 - 2 times per year at the location and the records in fact showed two other events with daily totals exceeding the rainfall on 5 October 2009, being 56mm on 15th October 2009 and 83.2mm on 1st February 2010. The issue Dr Shand says is not so much *the amount* of rain that fell, but *how much* fell within a particular time interval. In other words, if the rainfall event lasted only 1 hour, flooding would have a much greater impact than if the rainfall was spread over a 24-hour period.

[68] In addition, Dr Shand comments that not surprisingly the hydrological effect is affected by how wet the catchment is prior to the rainfall event. Dr Shand noted, as the photographs reveal, that the rainfall event of 5 October 2009 had resulted in:

a) channel bed incision and bank collapse within the mid-catchment near the access gate to the Hemi land;

b) channel incision and bank scarping where the channel and surface drains enter the lagoon;

c) re-orientation of the stream toward the western end of the lagoon;

d) lowering and scarping within the lagoon.

He concluded that the catchment had therefore been affected by *"exceptional"* rainfall and discharge.

[69] A research of aerial photographs reveals, Dr Shand says that this most recent behaviour comprised a fluctuation which nonetheless fits within historical limits for the channel locations of the stream. He noted that whilst the flooding had eroded the western lagoon margin, it had not affected the shoreline adjacent to the site of the proposed dwelling. In other words, Dr Shand's view was that recent events when seen in the context of the historical data provided by aerial photographs did not cause concern of increased risk of coastal erosion to the Hemi site from the lagoon.

Evaluation of Risk of Lagoon Edge Erosion

[70] There is no evidence to suggest that even on a worst case scenario the proposed dwelling site would be affected directly by erosion of the lagoon edge due to stream flooding.

[71] We are satisfied, relying on the evidence of Dr Shand, that the risk of coastal erosion from the lagoon side of the Hemi land to the proposed dwelling is more than acceptable. It is important to acknowledge that in terms of the RMA the Court is not so much concerned with there being no risk, but with assessing whether or not the risk is acceptable. We accept the expert opinion that the potential effect of coastal erosion on the proposed building site is one of low probability and low impact and is acceptable.

Overall Evaluation of Coastal Hazard

[72] We now consider the provisions of the NZCPS previously outlined. A key policy is Policy 3.4.5.

[73] Dr Ritchie emphasises use of the word *"avoided"*. The appellant argues that this policy is well-recognised by the dwelling design and construction, in particular, the location of the dwelling on the higher part of the site together with the slightly elevated and appropriately designed foundation is highlighted. In addition, the appellant submits that the proposal does not conflict with that policy as there are no hazard protection works involved or required. We agree that the design of the building as proposed and its location meets Policy 3.4.5 and that no hazard protection works are involved or required.

[74] We agree with the appellant's submission that NZCPS Policy 3.3.1 advocates a precautionary approach towards activities which may have some effect on coastal processes, though not activities which *may be affected by* the coastal processes. But even if we are wrong in that view, we are satisfied that the current proposal is not inconsistent with the policy because of the conservative nature of the assessments made and the conclusions reached by the experts that the prospects of seawater even reaching the basement portion of the building are extremely low in even the most rare combination of circumstances.

[75] We then consider Policy 5.2.9 of the PDP. This provides that development should be designed and located to avoid or mitigate the predicted effects of global climate change on natural hazards especially increased flooding and erosion.

[76] The current site and proposal has been the subject of considerable evaluation and assessment by Dr Shand. It would be rare to see such a level of information for what is essentially a proposal to build a house on a site which might be subject to coastal inundation or erosion. In this regard, there cannot be said to be "incomplete information" about the risk of hazard. In our view the evidence establishes that a precautionary approach has been taken in terms of Policy 5.2.9.

[77] As we have already mentioned the risk of coastal hazard is required to be assessed, but it would be wrong to conclude that a proposal must satisfy the court that all such risk is eliminated. We adopt the reasoning in ***Waterfront Watch Inc v Wellington Regional Council***[16] where the Court determined that a development that might be subject to coastal hazard should be able to be designed and operated at an acceptable level of risk. We agree that there is an element of "voluntary assumption of risk" by people who choose to live near the coast in situations such as this, and the Court's concern must be whether such risk is acceptable on all of the facts presented to it, rather than whether such risk is able to be avoided absolutely.

[78] For the above reasons, we are satisfied that the provisions of the NZCPS and the PDP are met.

[79] We are also satisfied that the risk of coastal hazard to the development proposed in this case is low and well out into the future. To the extent that there is any risk, it is minor and to the property of the appellant or to any future occupier of the proposed dwelling. We do not assess there to be any risk to the public generally. If the risk of inundation and/or erosion eventuates, the evidence satisfies us that review conditions can appropriately meet any concerns.

Ecological Effects

Statutory Provisions and Planning Instruments

[80] Section 6(c) of the Act requires the Court to recognise and provide for the protection of areas of significant indigenous vegetation as a matter of national importance. In addition, Section 7(d) of the Act requires the Court to have particular regard to the intrinsic values of ecosystems. *"Intrinsic values"* in relation to ecosystems are defined in Section 2 of the Act as:

> ... those aspects of ecosystems and their constituent parts which have value in their own right, including—
>
> (a) their biological and genetic diversity; and
>
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience

[81] Appendix 3 of the Regional Policy Statement ("the RPS") outlines criteria which apply in order for vegetation to be determined as regionally significant. The RPS criteria have been considered by the expert witnesses dealing with this topic, Dr Clarkson (a witness for Dr Ritchie), Mr Smale (a witness for WDC), and Dr Van Eyndhoven (a witness for the appellant).

[82] We are mindful of the provisions in the PDP and in particular Policies 2.2.3 and 2.2.5, but we are satisfied that the more important analysis is to be conducted in relation to the RPS, because the PDP provisions really echo the RPS provisions.

The Issues and the Evidence

[83] There are two aspects to the main issues under this heading which the evidence addresses:

a) The significance of the vegetation proposed to be removed; and

b) The adequacy of the proposed mitigation revegetation.

[84] The proposal contemplates the removal of 600 m² of indigenous vegetation with a revegetation plan comprising 4320m² of replanting. Overall six times that which will be

lost is proposed to be replaced, although it is accepted that it would take some 20-30 years of careful management to achieve the result intended.

[85] There are some differences between the witnesses about the significance of the existing vegetation in relation to its link to the Mt Karioi forest sequence, with Mr Smale being of the view that the 15m interruption between the areas of forest on the Hemi land and the rest of the mountain make the areas of forest on the Hemi land discreet blocks, and Dr Van Eyndhoven and Professor Clarkson agreeing that it is part of the wider Karioi Forest.

[86] The main area of dispute between the witnesses is however whether or not the proposed mitigation will outweigh any adverse effects caused by significant vegetation being removed. Dr Van Eyndhoven and Mr Smale think that it will, provided that restoration is undertaken carefully and is appropriately maintained in the future, but Professor Clarkson does not agree.

Significance of the Vegetation

[87] The vegetation that will be lost comprises low mahoe forest, which in Dr Van Eyndhoven's view forms a modified part of the ecologically significant Mt Karioi Forest.

[88] Currently approximately 69% of the property is dominated by exotic vegetation, the most abundant species of which are kikuyu and blackberry that form a dense smothering ground cover. Native species, but particularly scrub pohuehue are present in places within this. The remainder of the property is covered in patches of wind-shorn indigenous vegetation dominated by mahoe and scrub pohuehue up to approximately 5m in height. Kawakawa forms a sub-canopy and rasp fern and carex solandri are common in the ground strata. Pink bindweed and native jasmine are also present. Although 24 native species were able to be identified within the property, only 6 species, mahoe, scrub pohuehue, kawakawa, pink bindweed, native jasmine, and microlaena stipoides are abundant.

[89] As the site plan reveals, the indigenous vegetation comprises two main patches with several small "out-liers", none of which is directly connected to any other forest area. The neighbouring indigenous forest areas are much more mature and support a much more diverse structure and assemblage of species. The closest distance between

these patches and the surrounding forest areas is at least 15m. In Dr Van Eyndhoven's view, this demonstrates that the indigenous forest within the property is relatively young. However, given enough time as one might expect, the entire property would naturally regenerate into native forest, provided that the grass was not regularly mown, grazed or cleared, and that woody weeds were controlled. Professor Clarkson was prepared to acknowledge that the emergence of naturally establishing native plants would be difficult without human intervention. It is suggested that natural regeneration might take 20 – 30 years, but this would be without any disturbance to the natural succession growth by farming or human activity around the areas on the site where there is existing native vegetation.

[90] Generally speaking, the ecologists' view is that the indigenous vegetation within the property does not of itself contain sufficient ecological value to be considered ecologically significant. However, its ecological significance needs to be considered in the context of the wider landscape as it relates to the Mt Karioi vegetative sequence. Nonetheless, in Dr Van Eyndhoven's view, the forest within the property is not original remnant vegetation but has only recently regenerated from open pasture; therefore its contribution to the altitudinal sequence is relatively minor.

[91] The ecologists considered Appendix 3 the RPS to assess whether or not the vegetation on the site was regionally significant. They agreed that the site did not meet criterion 1, 2, 3, 5, 6 & 8, but did meet criterion 7, 9, 10 & 11 when considered as part of the wider vegetation sequence of Mt Karioi. In respect of the latter criterion, the ecologists agreed that this was because it is an area of indigenous vegetation or naturally occurring habitat that:

- is large relative to other examples in the Waikato region;[17] and
- is a healthy, representative example because its structure, composition, and ecological processes are largely intact; and if protected from the adverse effects of plant and animal pests and of adjacent land use can maintain its ecological sustainability over time;[18] and

[17] Criterion 7 Appendix 3 RPS
[18] Criterion 9 Appendix 3 RPS

- forms part of an ecological sequence that is either not common in the Waikato Region or ecological district, or is an exceptional representative example of its type;[19] and

- forms an ecological buffer, linkage or corridor which is necessary to protect any site identified as significant under other criteria[20].

[92] There was disagreement about Criterion 4 of Appendix 3 of the RPS which requires an assessment to be made of ecological value if the vegetation is *"... indigenous vegetation ... that is under-represented (10% or less if it's known or likely original extent remaining) in an Ecological District or Ecological Region or nationally"*. Professor Clarkson was of the view that the broadleaf coastal vegetation type present on the Hemi land, when viewed against the New Zealand Biodiversity Strategy means that such coastal forest is among New Zealand's most threatened of eco-systems. Mr Smale challenged this view, however all experts agreed that the vegetation meets the national criteria for Bio-Diversity Priority 1.

Adequacy of Mitigation

[93] The experts agree that the site is a difficult one to re-vegetate due to the presence of kikuyu, salt-laden winds and dryness and that whilst the site is regenerating naturally; it is and will continue to be a slow process. They agree that assisted re-vegetation would also be slow, but intensive management would assist and that some 20 – 30 years would be required for any successful mitigation planting to reach a similar condition to the existing vegetation which would be removed if the proposal was granted. They agree that any re-vegetation programme would need to be carefully managed and maintained. To this end a draft Vegetation Management Plan has been prepared.

[94] The main area of disagreement is whether or not the mitigation proposed is adequate to compensate for the loss of vegetation with Mr Smale and Dr Van Eyndhoven maintaining that it is, and Professor Clarkson maintaining that it is not. Having said that, Professor Clarkson agreed that his calculations of the relationship between the area of vegetation to be removed and the area to be revegetated would become quite different if some allowance was made for the benefits of revegetation of the 1500m2 in the north

[19] Criterion 10 Appendix 3 RPS
[20] Criterion 11 Appendix 3 RPS

eastern area of the site that he has disregarded and if the area of the vegetation to be removed was reduced to 600m^2 – that is the current proposal.

[95] In addition Professor Clarkson relies on the distinction between natural succession growth patterns and the possibility of a planting programme producing something different. The reality with this site is however that if not used for the current proposal it could be used for grazing or something else so long as the significant vegetation was not cleared. Such activities would however impede natural succession growth patterns.

Evaluation

[96] We agree that the vegetation on the site meets some of the criteria for significance set out in the RPS and the national priority documents. However, we are of the view that it qualifies, not because of its own intrinsic qualities, but because it is part of a sequence linking the Mt Karioi Forest to the coast. It cannot be denied that this sequence is disrupted and weaker than other tracts of land which provide a continuous link between Mt Karioi and the coast. There was some evidence about whether or not the vegetation on site provided an ecological corridor to Mt Karioi. In some respects this can be accepted, but in others, it cannot. On the one hand it can be said that the type of vegetation on the site is a continuation of the vegetation sequence from Mt Karioi as it transcends to the ocean. On the other hand, the realities of this site are that the coastal vegetation is regenerating and that in the not too distant past the site was used intermittently for grazing. It is impossible to ignore the margins of kikuyu grass and blackberry which effectively surround the patches of indigenous vegetation. This was particularly evident to us during the site visit, and it can be said with some force that the patches of indigenous vegetation are clearly interrupted or separated by the wide bands of kikuyu grass areas. At the time of the site visit, these bands gave the appearance of wide access ways around the indigenous vegetation.

[97] Also, whilst it cannot be discounted, that natural regeneration would occur, the pace at which it would occur is debateable, given the presence of kikuyu and blackberry, and the particular difficulties with growth on the site due to the salt-laden winds and the site's dryness. In our view, whilst there will be difficulties with regeneration even if it is carefully managed, it is more likely to be successful with human assistance than without.

[98] In our view the appellant has gone to significant efforts to deal responsibly with this particular issue. The re-design presented to the Court just before the hearing commenced, involved moving the building site 6m to the west to ensure that another 125m^2 of vegetation was not lost to the building site. The draft Vegetation Management Plan will need to ensure that the appropriately sourced genetic material is used.

[99] In our view, the proposal meets the requirements of Section 6(c) and 7(d) of the Act. We are satisfied that the objectives and policies of the relevant planning documents are able to be met by the mitigation planting proposed. On balance we are of the view that the revegetation proposal is a positive effect and outweighs the adverse effect of the 600m^2 of vegetation that would need to be removed. We do not agree with Dr Ritchie that the vegetation clearance should only be limited to the footprint of the dwelling. In making this decision we are mindful and have specifically taken into account that the revegetation programme will take some years to establish.

Natural Character, Landscape and Amenity Effects

Statutory Provisions and Planning Instruments

[100] Section 6(a) of the Act requires the Court as a matter of national importance to recognise and provide for the preservation of the natural character of the coastal environment, and to protect it from inappropriate subdivision, use and development

[101] Section 6(b) of the Act was also referred to in the hearing. It likewise requires the Court as a matter of national importance to recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

[102] The NZCPS sets out further amplification of Sections 6(a) and (b) of the Act.

a) *Policy 1.1.1* of the NZCPS provides that:

> It is a national priority to preserve the natural character of the coastal environment by:
>
> (a) encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;

(b) taking into account the potential effects of subdivision, use or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location;

(c) avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.

b) *Policy 1.1.3* of the NZCPS provides:

It is a national priority to protect the following features which in themselves, or in combination, are essential or important elements of the natural character of the coastal environment:

(a) landscapes, seascapes and landforms, including:

(i) significant representative examples of each landform which provide the variety in each region;

(ii) visually or scientifically significant geological features; and

(iii) the collective characteristics which give the coastal environment its natural character including wild and scenic areas;

(b) characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori; and

(c) significant places or areas of historic or cultural significance.

c) In addition, *Policy 1.1.5* of the NZCPS provides:

It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate.

[103] Objective 3.6.1 of the PDP echoes the provisions of Section 6(a) of the Act.

[104] Policy 3.6.2 of the PDP provides:

Subdivision, use and development should be of a density, scale, intensity and location that preserves the natural character of the coastal environment ... and should retain or enhance the relevant components of that character, including:

(a) geology, landform, indigenous vegetation and wildlife, and

(b) natural processes, elements and patterns, and

(c) intrinsic values of ecosystems, and

(d) restoration potential, including potential vegetation cover, and

(e) aesthetic, visual, cultural and heritage values attached to places and features, including the cultural and spiritual relationship of Maori with their ancestral lands, and

(f) unique or typical characteristics, and

(g) the scale and context of modifications, including:

- the ratio of open space to areas covered by buildings and other development
- land use
- open space areas and pasture, trees, crops or indigenous vegetation
- water quality and flows
- views of natural features, the coast, indigenous vegetation and water bodies

[105] Policy 3.6.2A of the PDP provides:

> Subdivision, use or development in the coastal environment should be located in areas where the natural character has already been compromised, and should not be sprawling or sporadic.

[106] Policy 3.6.2B of the PDP also provides:

> The unique natural character of the Whaanga coast should be specially recognised and protected including characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with Tikanga Maori, and significant places or areas of historic or cultural significance.

[107] The reasons for this are given in Policy 3.7.1B which specifically concerns the Whaanga Coast and which provides:

> The coast south of Raglan between Calvert Road and Papanui Point (Whaanga Coast Policy Area) is identified and protected as a landscape with scenic, recreational and cultural significance, important to the district, as referred to in the New Zealand Coastal Policy Statement 3.1.2. It is under intensive development pressure because of easy accessibility.

The Issues and the Evidence

[108] The Court heard evidence from three landscape architects: Ms R de Lambert for the appellant; Mr D Mansergh for WDC; and Mr S Brown for Dr Ritchie. Expert planning evidence was given by Mr A Matheson, relying on Ms de Lambert, and Mr C Dawson, relying on Mr Mansergh.

[109] The issues include:

a) whether the site should be part of the Mt Karioi ONL;

b) whether the natural character of the coastal environment would be adequately protected given the proposed design and revegetation of the site;

c) what the impact of the proposal will be on visual amenity and how significant this is;

d) whether Maori living in this specific environment, given the ancestral links to this site, is a matter of natural character;

e) whether the objectives and policies of the ODP and PDP as they relate to landscape and amenity values are able to be met by the proposal.

[110] In a Joint Witness Statement all of the landscape experts agreed that the site is not pristine or unmodified in terms of natural character. It has been modified by human activities and still shows signs of a previous bach (destroyed by fire) and associated exotic vegetation, past pastoral grazing, and recent vehicle access. However it was agreed that the site remains towards the high end of the natural character spectrum, although Mr Brown rated the site slightly above the level identified by Mr Mansergh and Ms de Lambert on that spectrum. All agreed that the proposed residence will not be highly visible from any public or private location, apart from a view from the track to the site. They also agreed that the existing visual catchment of the proposed house site already includes a number of houses, both houses in the bush and in the more suburban coastal Whale Bay settlement.

[111] The experts disagreed about:

a) Whether or not the site is an outstanding natural landscape (ONL), with Mr Brown maintaining that it should be included within the Mt Karioi ONL, and Mr Mansergh and Ms de Lambert maintaining that the subject site has not been, and should not be, included within the Mt Karioi ONL:

b) The significance of the spit landform as a discrete focal point of the Whaanga Coast landscape, with Mr Brown giving greater weight to the discrete nature of the spit landform and the extent to which it forms a focal point of the coastline landscape;

c) The effect of the proposal on the intrinsic landscape values of the site, with Mr Brown maintaining that the proposal is *"inherently inappropriate"* in relation to the intrinsic landscape and natural character values of the site. Whilst Mr Mansergh and Ms de Lambert were of the opinion that the proposal is appropriate and can be accommodated given the specific nature of the proposal and the integral enhancement proposed as part of the development, particularly through revegetation.

Is the site in an ONL?

[112] At the time of the Council hearing in 2005, the statutory significance of the distal spit was different than it is now. Since that hearing the respondent retained Boffa Miskell to undertake a study of the district's landscapes. The study concluded that although the slopes of Mt Karioi comprise a landscape policy area, effectively an ONL, this was not the case in relation to the shoreline around Whale Bay which was nonetheless recognised for its unique natural character, but not given the status of ONL.

[113] Mr Dawson confirmed that the outcome of the landscape study had been included in the proposed district plan through a schedule of outstanding landscapes and features and, relevantly, in the mapping of the Kariori Landscape Protection Area (KLPA). The subject site is not within that mapped KLPA. Mr Dawson confirmed also that the one outstanding appeal affecting the KLPA boundary did not impact on or challenge the boundary in relation to the Hemi proposal and in his opinion substantial weight could be placed on that boundary.[21]

[114] Mr Brown in his evidence told the Court he found that exclusion surprising, as in his view *"Mt Karioi's coastal location in connection with the Whaanga Coast is almost as fundamental to its landscape character and appeal as its craggy, volcanic profile"*.[22]

[115] However Mr Brown conceded that his evidence before the Court was largely based on the report he prepared in 2005. In response to questions from the Court he explained that he had reviewed the revised proposal but he had not reassessed the landscape setting for the proposal and he had not revisited the district plan provisions

[21] Dawson, Rebuttal, paragraphs 7 – 11.
[22] Paragraph [21] EIC

since that time.[23] Under cross-examination by Mr Muldowney, Mr Brown accepted that the current district plan is the relevant framework for the Court to consider and that it does not recognise the spit landform or the Hemi land as part of an ONL.[24]

[116] Ms de Lambert and Mr Mansergh both presented evidence that the site was not part of an outstanding natural landscape or feature and they accepted that it was not identified as part of an ONL/F in either the operative or proposed district plans. They considered that the boundaries of the nearby Mt Kariori LPA were appropriate and that they had been carefully considered through the proposed plan process.

[117] Whilst it is clear that this Court can nonetheless regard the proposed site as part of an ONL, on the facts of this case we are not persuaded that is the correct view. There is clearly a link with Mt Karioi visually, and by virtue of the ecological sequence of vegetation. A view of the site itself, however, places this more appropriately in context. The site itself does not comprise pristine coastal vegetation. The evidence establishes that the area is regenerating, but comprises as well significant areas of exotic species including the very invasive kikuyu and blackberry. As well, viewed from all angles, the site is clearly part of a landscape which has been modified. From the ocean, the development at Whale Bay[25] is built up in character. The area immediately behind the proposed site contains scattered but visually dominant houses which, whilst to be fair, blend into the environment they are nonetheless visible.

[118] On this issue we prefer the evidence of Ms de Lambert and Mr Mansergh. We accept the ONL status as set out in the district plans and find that the subject site is not part of an ONL. In so doing we note that the proposed plan is a relatively recent statutory document which has been subject to considerable public input and which, on this matter at least, is now settled.

Natural Character, Landscape and Amenity

[119] On this issue there was a divergence of opinion between Ms de Lambert and Mr Mansergh, and that of Mr Brown. In summary, Mr Brown's written evidence was that a dwelling should not be located on the site at all due to its potential to adversely affect

[23] Transcript, page 639.
[24] Transcript page 624.
[25] The Calvert Road subdivision

natural character. Mr Brown expressed the view in evidence that people's awareness of a building existing at the site was more of a challenge to natural character and landscape values than the visible effects of the building[26]. He accepted that the house as proposed would not be highly visible or highly prominent but he expressed reservations about the likely success of the proposed revegetation given the "toughness" of the site being exposed to the prevailing westerly winds and salt. Mr Brown conceded that some form of a dwelling on the site might be acceptable; although he did not consider that the proposed dwelling could be in that category.[27] Mr Brown did not accept that the Banks and Ritchie houses were of such prominence as to have effectively changed the natural character of the environment, and in his view, those houses were reasonably well integrated into the environment by use of the surrounding vegetation. Despite the closeness of the Whale Bay settlement and the presence of the Banks, Professor Ritchie and Dr Ritchie homes, Mr Brown attached more significance to the fact that the proposed house will be situated near the distal spit. It is important to record that the proposed building site is not situated on the distal spit. Nonetheless, in Mr Brown's view, the spit is such an important landform that locating a house near the distal spit would adversely affect the natural character.

[120] Mr Brown concentrated his attention on the area around the spit, the lagoon and the immediate shore area. In part this again seemed to reflect his outdated understanding of the statutory framework based on the 2005 version of the proposed plan which attributed a higher natural character status to this western part of the Whaanga coast.

[121] By comparison to Mr Brown both Ms de Lambert and Mr Mansergh had carried out detailed and recent assessments, at the micro and macro levels, for the purpose of this hearing.

[122] Ms de Lambert considered the natural character in terms of natural elements, natural patterns and natural processes. She acknowledged that the proposed development would introduce a change to the existing natural character of the site but considered that the building will have a very limited presence, sitting low into the vegetation and wider topography that defines the bay. In terms of the landform feature of the site, the coastal flat, this will remain largely unmodified with minimal excavation proposed and no overall alteration of the coastal characteristics of the landform, its seaward boulder beach

[26] Transcript, pages 615 – 616.
[27] Transcript, pages 628 – 629.

or tidal stream mouth embayment. She did not agree with Mr Brown's focus on the spit and considered that his analysis inappropriately separated the spit from the immediate and wider landscape to which it was irrevocably connected and experienced. In Ms de Lambert's opinion the nature of the change to the natural character would not alter the dominance of the natural environment over the very low density of low impact residential development already evident in this locality.[28]

[123] Relying on Ms de Lambert's evidence Mr Matheson opined that the site and its locality sit on the "slightly modified" end of the natural character spectrum. He summarised the signs of human influence as: past occupation of the application site; dwellings within regenerating indigenous vegetation; clearance of vegetation and subsequent growth of invasive weeds at and around the application site; active recreation; and a human (rather than natural) attempt to landscape the coastal edge.[29]

[124] Ms de Lambert considered that the proposal avoided sprawling or sporadic development because it was a location that had previously been occupied and was in the vicinity of similar low density "houses in the bush". In terms of effects on visual amenity she had determined that there was a limited visual catchment and the development would be less prominent than the more elevated houses on the hill behind the site.[30]

[125] Mr Mansergh's conclusion was that the proposed dwelling will not adversely affect the existing natural character of the coastal environment, or existing landscape and visual amenity values. Nor did he consider that it would adversely affect the landscape and visual amenity values associated with the adjacent Mt Kariori ONL. In Mr Mansergh's opinion the location of the dwelling within the site, being located in the lower lying hinterland away from the coastal edge and at the base of the steeper slopes beyond, meant that it would not significantly affect the key attributes of the site which contribute to the existing natural character of the coastal environment and surrounding landscape. Mr Mansergh and Ms de Lambert concurred that the site was able to absorb the development without resulting in any obvious change in surrounding landscape character or significant disturbance to the coastal landform. Critical to this was the proposed restoration planting which they considered would eventually enhance the amenity values and natural character associated with the site and its surrounding.[31]

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[28] De Lambert, EiC paragraphs 12.5 – 12.12, Rebuttal paragraphs 2.3, 2.4
[29] Matheson, EiC paragraphs 31, 32 and 34.
[30] De Lambert, EiC paragraphs 12.14 and 12.15
[31] Mansergh, EIC, paragraphs 128, 129 and 131 and Rebuttal, paragraphs 1.7 and 1.11.

Evaluation

[126] We agree with all of the experts that this coastal site and its locality have a strong natural character and high landscape and amenity values. However it is an area that is viewed and experienced in the context of the wider modified environment. One cannot escape the fact that the home of the Professors' Ritchie and the Banks home are visually more prominent than the proposed dwelling is likely to be. In terms of natural character and visual amenity we are satisfied that this proposal would not detract from the existing environment. The natural character of the environment has been changed by the Banks house and the home of the Professors' Ritchie and by the "suburban" nature of the Calvert Road, Whale Bay subdivision. Whilst both of the nearby dwellings to varying degrees are integrated into the vegetation around them, they are both quite visible from most angles.

[127] We do not place much attachment to the suggestion that the proposed dwelling will be visible from the sea. From our site inspection we confirmed that it will be set back and below the coastal edge such that most of the structure will be screened from the sea by vegetation with possibly only a portion of the roof visible. We are satisfied that the surfers are mainly interested in the surf breaks with the land masses behind forming a background to that activity, and in any event, as we have already said, there are already from the sea view three visibly dominant houses. Were these dwellings not in situ, then we may well have formed a different view about the natural character of the environment and the effect on the visual amenity of it in relation to this proposal.

[128] We concur with the evidence of Ms de Lambert and Mr Mansergh that the visual impact of the proposed building will be small given its design and the revegetation plan. We note that the revegetation proposal is a staged one, and whilst it is accepted that there will be time delays before the visual screening is complete, the dwelling will only be visible to a limited degree from the Whale Bay settlement (a built-up environment in any event), from the Boulder Bay public access from Whale Bay (accessed in the main by the surfing community) and the lagoon, and from the joint accessway to the site.

[129] Overall, for reasons we have already outlined, we prefer the evidence of Ms de Lambert and Mr Mansergh. We have found that the site is not part of an outstanding natural landscape or feature and so s6(b) of the Act is not directly relevant to our assessment. We are satisfied that the proposal preserves the natural character of the

coastal environment, an environment that is already modified, albeit slightly, by the signs of past occupation of the site, by the existing and visible nearby "houses in the bush" and by the more distant suburban development of Whale Bay. We consider that the proposal is an appropriate form of development which will maintain and enhance the landscape quality and amenity values of the environment. However we concur with all of the experts that the site is a challenging one in terms of the revegetation aspects which are an important part of the proposed mitigation.

[130] ***Aspects of Natural Character of Special Importance to Maori***

[131] The thrust of Ms Greensill's argument under this heading was to support Mr Hemi's case and to seek to extend what has been previously understood by the Courts to be the definition of *"natural character"*. Ms Greensill seeks to extend the definition to include Maori as being an important part of *"natural character"*, particularly if it can be established that there are particular ancestral links to the land upon which development is proposed. In this case, there can be no doubt that there are strong ancestral links to this land, the issue has been the hierarchy of such links and the weight which the Court should attach to the competing links which have been established.

[132] Ms Greensill's argument more fully developed is that the concept of *"tangata"* cannot be separated from the *"whenua"*. In other words, the concept of *tangata whenua* comprises the notion that Maori are part of the land. This, Ms Greensill submits, is part of the Maori concept of the world which in terms of whakapapa clearly links each person to the land. Further support for this view is gained, Ms Greensill submits, from the meaning of the word *"Maori"* which she submits can be interpreted most accurately as *"natural"*. The submission is that a Maori world view sees the people who are linked with the land as an integral part of it and further as part of its *"natural character"*.

[133] This topic was explored generally, but was not particularly well developed from an evidential sense during the hearing because the suggested extended definition was not specifically put to Ms de Lambert or Mr Mansergh. The Court's questions of Mr Brown were the only direct evidential link to the witnesses concerned with this specific topic. Mr Brown in cross-examination accepted that there had been some discussion in the past about "*natural character*" including a concept of Maori in the environment, but the impression given was that this concept had been, in effect, sidelined because the discussion was raised in the context of a proposed plan change and was accordingly

unable to be articulated in a meaningful way at such a general level. Mr Brown referred to the well-known research upon which landscape architects base their opinions as to what comprises *"natural character"*, but acknowledged that these are general studies.

[134] It seems to us that this argument could well be properly raised in respect of specific sites with clear ancestral links, although possibly might be more relevant when considering ancestral land in communal ownership rather than in private ownership. In this case, that distinction was not particularly important because the land, whilst privately owned, is a site to which, as we have already said, there are clear ancestral links both for the appellant and others who have expressed an interest in this proposal.

[135] For the purposes of this argument we are not prepared to find that Maori are part of the natural character of this particular site, although the argument in the context of this case matters little because of our findings in relation to cultural issues generally, and how the concept of kaitiakitanga is able to be managed best in relation to this site.

Cultural Values

[136] Dr Ritchie's case is that the importance of the Hemi land to tangata whenua is such that it should not be built on.

Statutory Provisions and Planning Instruments

[137] Section 6(e) of the Act requires the Court as a matter of national importance to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. Maori ancestral land has been defined as "land which has been owned by ancestors". Whether or not that is the case is a factual issue for the court to determine. Section 6(e) also requires the Court to consider the relationship of Maori and their culture and traditions with *"sites"*. Given that *"waahi tapu"* are separately included in Section 6(e), *"sites"* must by definition be places which are not waahi tapu or ancestral lands.

[138] In ***Serenella Holdings Limited v Rodney District Council***[32] the Court was asked to consider the relationship of Maori and their culture and traditions with a site which was not waahi tapu but which was proposed for sand mining. The evidence established

[32] A100/2004, Newhook,DCJ

that the site had been a place of gardening and possibly used for singing and speeches. In considering this the Court held at paragraph 106:

> It is important however to record that the matters of national importance in s.6(e) that are to be recognised and provided for, should not generally include everyday activities and wide-spread but long-lost random burials, with the consequence of preventing new endeavour on the land. The consequences for continuing human endeavour are obvious: it would become difficult or even impossible to obtain consents to carry out activities on land that has passed out of Maori ownership to non-Crown interests, if the principles in s.6(e) are to be considered to operate in some sort of blanket fashion based on daily general association with the land of Maori life in times past. Section 6(e) calls for proof of something more in order to attain recognition and provision as a matter of national importance.

[139] Section 6(f) requires the Court as a matter of national importance to recognise and provide for *"the protection of historic heritage from inappropriate subdivision, use and development"*. By virtue of Section 2, the definition of *historic heritage* is not limited to waahi tapu or archaeological sites. It includes *"sites of significance to Maori, including waahi tapu"* and *"surroundings associated with the natural and physical resources"* to which Maori may attach heritage values. Dr Ritchie submits that this section is relevant and refers to ***Tainui Hapu v Waikato District Council***[33] where consent was refused for a TV transmitter because the proposed site had considerable spiritual and cultural significance, although it was not an archaeological site or waahi tapu.

[140] Further, the Court must have particular regard to kaitiakitanga under Section 7(a) of the Act. It is clear from previous case law that the concept of kaitiakitanga may involve degrees and the exercise of stewardship at different levels.[34]

[141] Chapter 2 of the NZCPS contains three policies which relate to the protection of the characteristics of the coastal environment of special value to tangata whenua including waahi tapu. Policy 2.1.1 relates to the identification of such characteristics, Policy 2.1.2 relates to their protection in accordance with tikanga Maori and Policy 2.1.3 relates to management of them. Whilst generally relevant to this case they seem impliedly to relate more to local authorities considering these issues at a plan development level. Nonetheless the facts of this case have raised a conflict between Maori as to the significance of this site as part of the coastal environment, with the result that these Policies will also be addressed by us.

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[33] Planning Tribunal Auckland, 21/08/96, Sheppard, J at pp 8 - 9

[34] ***Friends & Community of Ngawha v Minister of Corrections***, 20/06/02 Wild, J HC Wellington A10/02

[142] Paragraph 2.1.5 of the RPS outlines two Policies which are designed to address the requirements of Sections 6(e) and 7(a) of the Act. Both Policies provide methods for implementing those requirements. In the context of this application they include an obligation to consult with tangata whenua about the application itself and also to consult about the meaning of kaitiakitanga as it applies to kaitiaki management of resources in relation to specific sites.

The Issues and the Evidence

[143] There are three issues which arise:-

a) There is a general issue about the adequacy of the consultation undertaken by the appellant with tangata whenua;

b) A dispute about how significant the Hemi land is from an ancestral perspective;

c) Whether kaitiakitanga will be better able to be exercised by granting the proposal.

Underlying the last two issues is a dispute about who has the greater claim to the mana whenua and ahi kaa in respect of the Hemi land and therefore whose evidence should be given more weight.

[144] The witnesses called for the appellant on this issue were Mr Hemi himself to establish his whakapapa links, and Mr Mikaere who was called to give expert opinion on the historical links and significance of the site. Ms Greensill's evidence in support was given by herself, Mrs Te Kanawa, Mrs Hinemoa Laird, Mr James Rickard and Mr Tex Rickard. Dr Ritchie's evidence on this topic was given by Mr Puke.

Consultation

[145] Extensive consultation was undertaken with tangata whenua in this case. There is significant support for the appellant's proposal from the local hapu, Tainui Awhiro and some members of the Puke whanau. Mr Puke claims links to the Hemi land through his ancestor Kameta Te Tuhi and claimed that some descendants had not been properly

consulted. It is important to note that whilst Mr Puke gave evidence for Dr Ritchie, no other evidence was called from other descendants who were said to oppose the application and exactly who these people were was not identified.

[146] In ***Nga Uri or Wiremu Mormona Raua Ko Whakarongohau Pita Inc v Far North District Council***,[35] the court referred to the fact that consultation with tangata whenua is not an express requirement of the Act, but said:

> ... lack of consultation can produce situations in which want of adequate consultation (process) can affect the extent and quality of information gathered, and therefore potentially the outcome.[36]

[147] As was held in ***Gannet Beach Adventures Limited v Hastings District Council***:[37]

> Consultation is not an end in itself; it is the method of gathering views from those affected so that they can be taken into account in the decision-making process.

[148] Further in ***Gannet Beach***, the Court considered the role of representative bodies for iwi or hapu, and held:[38]

> Where an iwi or hapu has a recognised representative body, such as a runanga organisation, a trust board, or something similar, it is entirely appropriate that an applicant or a local authority should consult that body as the iwi/hapu representative. To do otherwise is to invite anarchy.
>
> Unless there is some extraordinary factor plainly signalling that the processes of that body are dysfunctional and cannot be relied upon, the responses given by it should be accepted as authoritatively speaking for the iwi or the hapu.
>
> It is human nature that in any representative body there will be dissenting views which remain after the decision-making processes have concluded. This can be so even where, as is the custom for Maori organisations, the objective is a consensus rather than a majority decision.
>
> The fact that individuals express dissent with an announced decision does not mean that the applicant or local authority or this court for that matter, cannot rely upon the decision announced by those whose positions entitle them to announce them.

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[35] A14/2008
[36] Supra, para [220]
[37] [2005] NZRMA 311, para [84]
[38] Supra, para [89]

[149] Our view is that the appropriate iwi/hapu representative organisation was Tainui Awhiro. Ms Greensill as secretary of Tainui Awhiro also directed the appellant to consult with Mr Sunnex and Ms Knowles, because these people had been identified by the late Mr Hare Puke as the appropriate people to consult. All are agreed that the late Mr Hare Puke had the mana or authority to determine who should be consulted and we infer that Mr Sunnex and Ms Knowles were consulted as descendants of Kameta Te Tuhi. Mr Sunnex and Mrs Knowles subsequently consented to the appellant's proposal. Mr Puke and those who stand behind him disagree that Mr Sunnex and Ms Knowles had authority to consent for all that group.

[150] Whether or not complete agreement was forthcoming in respect of the appellants proposal is however not the issue. The focus must be on the adequacy of the consultation bearing in mind the Part II matters this court needs to consider as they relate to tangata whenua. We accept that extensive efforts were made by the appellant to try and consult, particularly with Mr Puke and those who were apparently in disagreement with the proposal. For whatever reason, attempts to meet and try and discuss this failed. We were left with the impression that Mr Puke was given plenty of opportunity to discuss matters with the appellants, but chose not to do so.

[151] We are satisfied that appropriate consultation took place and what has occurred here is that certain interests within one potentially interested group do not agree with the proposal. It is important to note that despite Mr Puke's complaint that inadequate consultation has taken place this has been eased to a significant degree by the fact that he has been able to present his views in this Court and we have been able to assess and consider his views as part of this case.

The Ancestral Importance of the Land (Section 6(e))

[152] Te Whaanga is the birthplace of Whatihua and Turongo, two important Tainui chiefs and ancestors. Whilst there was considerable evidence given to the Court addressed to the strength of particular whanau links to the Hemi land, there was no disagreement that it is significant from an ancestral perspective. The degree of the significance of the Hemi land is in dispute. Overall, all of the participants in this hearing who have ancestral links to the land are concerned to ensure that responsible stewardship over the area continues. In this regard as the Court commented at the end of the hearing, the parties have more in common than they have in dispute.

Relationship of Maori to Site, Waahi Tapu and other Taonga

[153] Section 6(e) refers to ancestral land, sites, and also to waahi tapu and other taonga. There was disputed evidence about whether or not a tuahu or altar was erected on the Hemi land, whether or not Te Whaanga was used as a canoe anchorage, and whether or not because taniwha are said to reside along the coastline of the Hemi land, this means that it is inappropriate for a dwelling to be built on it. As part of this topic we will also consider the disputed evidence about whether the site contains waahi tapu.

Tuahu

[154] Mr Puke gave evidence that a tuahu or altar had historically been erected by Rakataura, an important Tainui tohunga at Te Whaanga, possibly on the Hemi land. This is one of the reasons he submits that a house should not be built on the Hemi land.

[155] Mr James Rickard, a master carver and historian for Ngati Te Ikaunahi gave evidence in rebuttal on this point. His evidence was that no tuahu was constructed at Te Whaanga on the Hemi land because altars were constructed in isolated and usually inaccessible places not only to protect the mana of the tohunga, but to ensure that ordinary folk did not transgress the sanctity of the land.[39] Mr Rickard gave evidence that the tuahu would have been built on Mt Karioi on a large flat clearing on the south eastern ridge.[40] Mr Rickard told the court that had there been a tuahu on the Hemi land the bach that burnt down would not have been built there even if it was only used as a seasonal or temporary dwelling.

[156] Mrs Te Kanawa a kuia and "holder of knowledge" for Te Whaanga which includes the Hemi land also disputed the existence of a tuahu at Te Whaanga or indeed on the Hemi land. She told the court that a tuahu was a waahi tapu where tohunga performed their karakia[41]. Her evidence supported the tuahu being on Mt Karioi.

[157] Mr Mikaere, on behalf of the appellant, supported this view and added:

[39] Rickard, para [2.8] rebuttal evidence
[40] Rickard, para [2.9] evidence in chief
[41] Para [4.2 and 4.3]

> That the tuahu should be on top of the mountain is also more likely given the propensity for early explorers of the land – as related in tribal traditions – to ascend mountains as a way of seeing the lay of the land and as a means of claiming that land.[42]

[158] We are persuaded by the evidence of Mr Rickard, Mrs Te Kanawa and Mr Mikaere on this topic. Mr Rickard and Mrs Te Kanawa are both holders of knowledge for the local hapu. Their evidence should in our view be given considerable weight. We are satisfied that there is insufficient evidence to establish the existence of a tuahu on the Hemi land.

Te Whaanga as an Anchorage for Tainui Canoe

[159] Mr Puke's evidence was that the outrigger of the Tainui canoe was detached at Te Whaanga[43], which would mean that site has considerable significance to all of the Tainui iwi.

[160] This evidence is disputed by the witnesses for Ms Greensill, mainly Mrs Te Kanawa[44] and Mr Rickard[45]. Mr Mikaere for the appellant highlights the problems that exist with traditions which are recorded orally. His evidence on this point is really to the effect that there may well be two oral histories which record different but opposing "truths "about the landing of the outrigger.

[161] Given the disputed evidence we are not satisfied to any sufficient degree that the Hemi land itself was a landing place for the outrigger of the Tainui canoe.

Taniwha

[162] Mr Puke further submits that it is important that the Hemi land is not built upon because of the existence of taniwha which he says resides along the coastline. The taniwha referred to are Te Atai O Rongo, Tuheitia, Te Aorere and Te Aopiki. In particular, Mr Puke's evidence is that the taniwha Te Atai O Rongo, Te Aopiki and Te Aorere are responsible for large waves along the coastline. Mr Puke refers to a carving at the Kokiri centre at Whaingaroa ki te Whenua which records this.

[42] Mikaere, para [17] rebuttal evidence
[43] Puke, para [1.9]

[163] Both Mr Mikaere and Mr James Rickard dispute that the taniwha named by Mr Puke either reside along the coastline, or in the case of Te Aopiki and Te Aorere cause the huge waves along the coast.[46] Mr Rickard told the Court that the carving referred to by Mr Puke was done by his students and that in fact it refers to Kupe and the taniwha Te Ataiorongo and Tuheitia[47]

[164] On this topic we prefer the evidence of Mr Rickard who clearly has a detailed knowledge of these matters. We are not satisfied that taniwha exist on this part of the coastline near the Hemi land.

Waahi Tapu

[165] Mr Puke in his evidence-in-chief recalled two occasions when as a child he was told not to play near the outcrops of the rocks on the slopes overlooking the bay and beyond the bay where the cliffs met the sea, because they were said to be tapu. Further, Mr Puke says that he was told that the rock features were repositories of human remains and afterbirth, and the cliffs to the south on the neighbouring property were the site of an ancient urupa, or burial ground. Whilst the building site itself is therefore not waahi tapu, Mr Puke submits that the use of it essentially as a" reserve "for seasonal food gathering purposes reflects these facts. The fact that nobody ever established a permanent dwelling on the Hemi land he said, was further evidence of this[48].

[166] The original archaeological report prepared for the Council hearing by Mr Wilkes established that there were no urupa or archaeological findings on the site. Mr Mikaere's evidence is that the bach and camping activities, together with the obvious use of the site for the processing of food, is strongly indicative that this is not a waahi tapu site. Mr Mikaere disagrees with Mr Puke's comments that the temporary use of the site was not inconsistent with it having some sort of tapu status.[49] Further, Mr Mikaere says this is inconsistent with the tapu lifting ceremony that was conducted on the site some time prior to 1965. Mr James Rickard supports Mr Mikaere's position that camping and eating would not take place in an urupa.[50]

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[46] Rickard, para [4]
[47] Para [4.2]
[48] Puke, paras [1.27] - [1.29]
[49] Mikaere, para [61] rebuttal evidence
[50] Rickard, para [9.3]

[167] We are satisfied on the evidence that the Hemi land itself does not contain urupa and is not the site of any waahi tapu. The conditions proposed deal adequately with this issue should consent be granted.

Findings in Relation to Tuahu, Canoe Anchorage, Taniwha, and Waahi Tapu

[168] In making the findings we have we intend no disrespect to Mr Puke. We acknowledge the fact that the witnesses who have ancestral links with the Hemi land and Te Whaanga generally have been prepared to share their histories in Court and this indicates the importance that each attach to that history. The Court must be careful not to make findings one way or another in a traditional credibility sense. It is not simply a question of whose version is more truthful than the other, nor indeed is it even a question of whose evidence is more reliable. There will inevitably be variations to the various histories because of the problems which face all those who recount events after they have occurred. We are however satisfied that Mr Rickard and Mrs Te Kanawa have special status within their hapu as the holders of knowledge for this particular area and this particular piece of land. Their evidence must therefore be given more weight.

Evaluation under section 6(e).

[169] We must make an assessment under Section 6(e) of the Act, and we must recognise and provide for the matters contained in Section 6(e) as a matter of national importance when considering the proposal for this site by the appellant. We have made findings that there is insufficient evidence to establish the existence of waahi tapu or other taonga on or in respect of the Hemi land. We recognize however that the Hemi land is important from an ancestral perspective to Mr Puke and to the others who support his view.

[170] The reality is however that the Hemi land has been in private ownership for some time and access to it is legally at the whim of the owner. There has been nothing in the evidence which indicates that if a house was built on the Hemi land the ancestral links to it would be severed. The contrary is true. Mr Hemi has gone to considerable lengths to incorporate into the design of the house factors which recognise ancestral links, and by providing an area specifically for camping will enable those links to be maintained by those who choose to accept his open invitation to use the area.

[171] Mr Puke's evidence reiterates the theme that was presented in Dr Ritchie's case that the Hemi land should be made into a recreational reserve. There is no ability for this Court to require any private land owner to convert their land to recreational reserve. Further, Mr Puke's evidence criticises the camping area provided because it is:[51]

> Not our usual traditional site and is not suitable, being small with limited vehicle parking area, not flat and much less sheltered than our usual site. In addition our whanau was not consulted about this change.

Mr Puke's criticism of the camping area seems to assume that there is a right to continue to use the land in exactly the same way as it has been used, despite its private ownership. On Mr Puke's own evidence, he has not attended the site for 14 years, notwithstanding the fact that 6 years ago it was still owned by members of his family.

[172] We are satisfied that the proposal meets the criteria set out in Section 6(e) of the Act and that it recognises and provides for the relationship of Maori and their culture and traditions in relation to this site to be maintained.

Evaluation under section 6 (f).

[173] Dr Ritchie submitted that s6(f) was relevant as the Hemi land is one of historic heritage which as a matter of national importance should be protected from inappropriate use. The same arguments as those raised under s6(e) were advanced under this heading. Our findings above apply equally under this heading.

[174] In addition it was submitted that Clarence Te Puke intended the Hemi land to be used communally rather than for an individual residence. This is disputed by Mr Hemi. We agree with Mr Lang that these opposing hearsay statements are problematic to resolve. We cannot give either version any significant weight.

[175] We prefer to rely on the written record. The cross-lease agreement anticipated a dwelling on the Hemi land and this document was signed by Caryl Te Puke before she sold the land to the Hemi family. The Professors' Ritchie were parties to this document.

[176] We are satisfied that the Te Whaanga area generally has ancestral importance to Tainui. We are not satisfied however that the Hemi land is a site of historic heritage

[51] Puke, para [3.9]

under s 6(f). We are satisfied that there are strong ancestral links to it by the local hapu and also to inland hapu of Tainui, but the appellant's proposal recognizes this. Even if we are wrong in this assessment in our view the use suggested is appropriate, given the matters to which we have earlier referred in this decision.

Kaitiakitanga (Section 7 of the Act)

Ahi Kaa

[177] Considerable evidence was called at the hearing on the topic of who holds the ahi kaa for this site. This concept is not defined under the Act, but generally speaking, all parties submitted that its meaning is "*fires of occupation which carries with it the concept of continuous occupation or rights to land by occupation*"[52].

[178] The appellant's case is that the ethic of kaitiakitanga manifests itself within the efforts of those who have maintained the ahi kaa. There is some overlap in the consideration of this principle between Section 6(e) and Section 7 of the Act.

[179] Ms Greensill argued that the selling of the Hemi land by Caryl Puke extinguished the ahi kaa of the Puke whanau in relation to it. This point is significant to Ms Greensill's case because she contends that those who retain the ahi kaa through their mana whenua are those who have more of a say about what should happen with the land.

[180] The thrust of Mr Puke's argument was that Ngati Mahuta and Ngati Mahara, two of the inland hapu of Tainui to which he is affiliated have strong ancestral links to this site and Te Whaanga generally as it is the place where they gather kaimoana for their own marae and to meet their obligations at Turangawaewae. Mr Puke submits that this establishes ahi kaa for his hapu. He therefore submitted that the concept of ahi kaa does not only apply to those hapu who are physically present at Te Whaanga. The thrust of his argument was that it is the ancestors which provide the ahi kaa, not the present descendants. Impliedly therefore the ahi kaa of the Tainui inland hapu have not been extinguished by the sale of the Puke land. Dr Ritchie relies on ***Haybridge Developments Limited v Western Bay of Plenty District Council***[53]. There does however seem to be

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[52] Section 4 Te Ture Whenua Maori Act 1993
[53] [2002]/2002, Bollard, J

recognition by Dr Ritchie that in terms of ahi kaa, Mr Puke's fires and his whanau's fire might *"no longer be burning hot but may still be alight"*[54].

[181] Mr Puke also argued that the Hemi whanau could not claim mana whenua and kaitiaki status because the only link able to be established was affiliation with Ngati Koata generally and not direct lineage to this site. Mr Puke also challenged the Hemi whanau's kaitiaki status because their link with the land through Mrs Kereopa changed when she separated out her interest in the 1D1D lands and consolidated them into the 1D1D1 block[55]. The argument here is that the Hemi interests through their ancestors were partitioned in 1947 and whilst there remains a link between the grandmothers of the Hemi whanau and Ms Greensill via Mrs Te Kanawa, that relates to one of the Kereopa blocks of land and not to this site[56].

[182] Ms Greensill, Mr James Rickard and Mr Mikaere do not agree with Mr Puke's interpretation of ahi kaa or kaitiaki status. The evidence for the appellant and Ms Greensill is that the ancestral connections Ngati Koata and Ngati Te Ikaunahi have to the site manifest in a tradition of permanent occupation.

[183] There is also direct evidence from Mrs Te Kanawa confirming that the Hemi whanau have direct ancestral links to the land itself, rather than simply hapu links[57].

[184] In any event, it seems to us that the issue of ahi kaa is not necessarily one which this Court needs to decide, even in the context of this case. By this we mean no disrespect to the various arguments and evidence put forward by the parties. But the starting point here must be that the land in question is now privately owned by the Hemi Whanau Trust. The Puke whanau/hapu's ancestral links to the land are not disputed, but given that the site is privately owned, the proposal by Mr Hemi provides for more recognition of these links than might be the case had the land been sold to someone else. The links are recognised by the provision of a camping area, and by the open offer of access to the Hemi land for gathering kaimoana and for camping. If Mr Puke or his whanau choose not to take up this opportunity that is their choice, but it should not affect the Court's assessment of whether Sections 6 (e), (f) or 7 are met by the proposal.

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[54] Ritchie, Para [1.20] Submissions in Reply
[55] Puke, para [2.1]
[56] Puke, para [2.5]
[57] Para [2.11, 2.12, 3.11]

Kaitiakitanga

[185] The appellant's case is that whilst kaitiakitanga may be exercised by many, those who have a particular direct link to the land have more responsibility for exercising it than others. In this regard, Ms Greensill's case is that the Hemi whanau residing in a house on the site will in fact enable kaitiakitanga to be more appropriately exercised.

[186] Because the Indicators surf break is internationally significant and because over the years the Raglan/Whaiangaroa region has been developed as an important surfing destination, the increased human activity around Te Whaanga has and can at times cause problems for those who live there. Mr Duff, a resident in Whale Bay whose home overlooks Te Whaanga is also an owner of a local backpackers. He confirmed that there were those in the community who wish to take full commercial advantage of the market for attracting surfers to this area.

[187] Mr Malibu Hamilton told the Court about occasions when surfers disrespected the area in the way they treated it. He referred to the bush being used as a toilet from time to time, the surfers' dogs on occasion being unrestrained, and generally the area being treated as a rubbish dump. He told the court that the presence of Maori living on the Hemi land would help prevent this happening. Whilst Mr Hamilton, a surfer himself, was careful to point out that this behaviour was not typical of all or even the majority of the surfing community, the increasing popularity of Raglan/Whaingaroa as a surfing destination has no doubt exacerbated these potential problems.

[188] We were given access to Pablo Kereopa's land in Whale Bay during our site visit. Mr Kereopa has had to install a large locked gate at this property to prevent surfers and others who desire to access the surf break quickly, from doing so over private land.

[189] In this case, all those who gave evidence on cultural issues impressed us as having a strong sense of duty to ensure that kaitiakitanga is exercised in respect of the site. Despite disputes about ancestral links to the land, this is the not the determining issue when considering the Court's obligation under Section 7 of the Act. Section 7 requires the Court to have particular regard to kaitiakitanga when considering managing the use, development and protection of natural and physical resources. In this case, given the particular development of Raglan/Whaingaroa as a surfing destination, we accept that the presence of the people living at the site that have ancestral links to the land and the

support of local hapu, will enable not only them, but others who exercise kaitiakitanga to be able to do so more easily. There will be an ability to more effectively, and on a daily basis, monitor the immediate environment.

[190] The appellant offers access to those who have ancestral links to the land to enable kaimoana gathering and traditional uses to continue to be exercised. We do not accept Dr Ritchie's criticism of the camping area which is proposed. There was no actual evidence brought by Dr Ritchie to suggest why it was not suitable, apart from the fact that it was placed in a different position and perhaps is not as large as the area in which people were free to camp previously.

[191] We do not think that the opposition raised by Dr Ritchie in this regard is significant. We are satisfied that the proposal does meet the matters outlined in Section 7(a) the Act and the real issue will be whether or not the Puke whanau who continue to oppose this proposal choose to avail themselves of the offer of continued access which has been made to them by the appellant.

Overall Evaluation in respect of Cultural Issues

[192] Overall, we are satisfied that the proposal meets the obligations we are required to consider in Sections 6(e) and 7 of the Act and those which are contained in the NZCPS and the RPS. We are of the view that in fact the proposal positively enables ancestral links to be maintained with this piece of land and positively enables the principle of kaitiakitanga to more effectively operate. We have made these findings understanding that the appellant's proposal embraces and fosters, albeit informally, others who have relevant links to the land to continue to exercise them.

Overall Decision under Section 104D of the Act

[193] We have considered fully the potential effects associated with this proposal. Having analysed each of the effects we are of the view that they are no more than minor. We are also of the view that on an overall consideration of the purposes and scheme of the relevant plans, the proposal is not contrary to the objectives and policies of the Plans.

[194] We find that the proposal passes both of the gateway tests under S104D.

Overall Consideration under Section 104 of the Act

[195] We now need to consider the proposal under Section 104(1) of the Act being the actual and potential effects, including positive effects, on the environment and the relevant statutory provisions. We have fully addressed these aspects in the previous sections of this decision. We find that the tests under S104 (1) have been met.

[196] We also need to consider the integrity of planning instruments and the precedent effect of granting the proposal. We adopt the reasoning of the Court in ***Foster v Rodney District Council***[58] where in respect of a non-complying activity the Court restated that the question for it is:

> ... How does this application represent unusual qualities or a true exception within its comparative area?

[197] In the context of this case the argument by Dr Ritchie is that allowing the house to be built on this site where it is categorised as a non complying activity would both undermine the integrity of the PDP provisions as they relate to the building setback requirement and would also have a precedent effect allowing further dwellings to be built in the coastal environment. This she argues would effectively open the door to development in the sensitive coastal environment. Correspondingly, the appellant submits that this application has a unique quality to it because of the cultural aspects and because of the proposal itself as it relates to design and replanting.

[198] We are satisfied on the facts of this case that the proposal does have special characteristics. The historical and cultural links to the Hemi land cannot be ignored and the fact that the appellant wishes to recognise these aspects not only in design but encouraging continued use of the land by the provision of the camping area, make it somewhat unusual. The proposal has strong support from local hapu who have a long standing association with the site and with Te Whaanga generally. We are mindful that Mr Puke had opposed the use of the Hemi land for building, but this ignores the fact that in the not too distant past a dwelling was present on the land, even if it was only used intermittently. Given that the land is privately owned, whether a house was able to be built on the property or not would not affect Mr Puke's right to actually access the

[58] Ibid, para [122]

property. The stark reality is that any access by anyone who has ancestral links to the site must be with the owners' consent.

[199] We are also mindful of the fact that there is little other realistic use that could be made of this site as privately owned property. We are also mindful that apart from Dr Ritchie, none of the other immediate neighbours oppose the proposal.

[200] We do not see that this application will open the floodgates or set a precedent. The application itself has been very carefully presented, full research has been undertaken into the various effects, and a design which is both sympathetic to the environment and cognisant of the importance of it has been presented to the Court. We agree with Mr Matheson that the dimension of 100m for the building setback rule is a somewhat arbitrary number. More importantly we have found that the purpose of the rule, as expressed in the objectives and policies, has been achieved through the comprehensive and site specific analysis presented in this case. We are of the view that any adverse effects of allowing the building in the environment will be outweighed by the positive effects of the revegetation programme which can best be supported by people being present on the site.

The Council's Decision

[201] We are required under Section 290A of the Act to have regard to the Council's decision. In so doing we are mindful that this is a de novo hearing and that a significant amount of new and site specific information has been completed since the Council hearing. We also had the benefit of cross-examination.

Overall Assessment under Section 5 of the Act

[202] For the reasons we have expressed, we are satisfied that the enabling aspect of sustainable management of natural and physical resources is well served by the proposal and that consent should be granted subject to conditions. We are satisfied that the natural character, landscape, and amenity values in relation to the site will be recognised and protected by the design of the dwelling, the limited vegetation removal, the Revegetation Plan, and ecological benefits which will arise from that.

Consent Conditions

[203] In the appellant's submissions in reply, a re-drafted copy of consent conditions was attached. In general, we are satisfied that the proposed conditions are appropriate.

[204] The appellant must:

a. consult with the Waikato District Council, Ms Greensill and Dr Ritchie about the proposed conditions; and

b. lodge and serve amended conditions including all volunteered and/or agreed changes within 20 working days of this decision.

[205] Any party who wishes to be heard on the document served under the above must lodge and serve a notice to that effect specifying:

a. what changes they want made to make the document implement this decision; and

b. the reasons for the changes, within a further 5 working days of the receipt of the document specified in the above paragraph.

[206] Costs are reserved.

[207] This decision is final in all other respects.

DATED at HAMILTON this 24th day of June 2010

For the Court:

Judge M Harland
Environment Court Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND