

**BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2018] NZEnvC 076**

IN THE MATTER of the Resource Management Act 1991  
AND of appeals under clause 14 of Schedule 1 to the  
Act relating to the proposed Thames-  
Coromandel District Plan in relation to the  
Coastal Environment and Natural Character  
Topics  
BETWEEN KEITH VERNON  
(ENV-2016-AKL-000084)  
AND Others (listed overleaf)  
Appellants  
AND THAMES-COROMANDEL DISTRICT PLAN  
Respondent  
AND Others (listed overleaf)  
s274 Parties

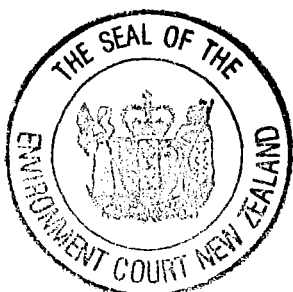
Court: Environment Judge D A Kirkpatrick  
Environment Commissioner E von Dadelszen  
Environment Commissioner D Bunting

Hearing: 21 May 2018 at Auckland

Appearances: J L Vella with P Davies and C F Timbs for the Respondent  
J M Savage for Whangapoua Beach Ratepayers Association  
C Vickerman on behalf of Coromandel Property Owners' Alliance  
K Vernon in person  
R G Gardner for Federated Farmers of New Zealand  
M Wright for Environmental Defence Society

Date of Decision: 24 May 2018

Date of Issue: 24 May 2018



Other Appellants: WHANGAPOUA BEACH RATEPAYERS  
ASSN INC  
(ENV-2016-AKL-000088)

TASMAN BUILDINGS LTD  
(ENV-2016-AKL-000094)

K & M RABARTS FAMILY TRUST & ors  
(ENV-2016-AKL-000103)

PETER PRATT  
(ENV-2016-AKL-000108)

MINISTRY OF BUSINESS, INNOVATION  
AND EMPLOYMENT  
(ENV-2016-AKL-000109)

NORTHERN LAND PROPERTY LTD  
(ENV-2016-AKL-000116)

NGĀTI MARU RŪNANGA TRUST  
(ENV-2016-AKL-000120)

POWERCO LTD  
(ENV-2016-AKL-000125)

MAX TOOMEY, COLLEEN TOOMEY AND  
STEPHEN NATHAN QC  
(ENV-2016-AKL-000127)

JENNI EVERITT AND TRUSTEES OF THE  
CHEESEMAN FAMILY TRUST  
(ENV-2016-AKL-000128)

TAIRUA ENVIRONMENT SOCIETY INC  
(ENV-2016-AKL-000131)

STEVE & ROSEMARY GARLAND  
(ENV-2016-AKL-000138)

CLARE WARD FAMILY TRUST & ors  
(ENV-2016-AKL-000142)

ROYAL FOREST AND BIRD PROTECTION  
SOCIETY OF NZ INC  
(ENV-2016-AKL-000143)



COROMANDEL WATCHDOG OF HAURAKI  
INC  
(ENV-2016-AKL-000145)

WAIKATO REGIONAL COUNCIL  
(ENV-2016-AKL-000146)

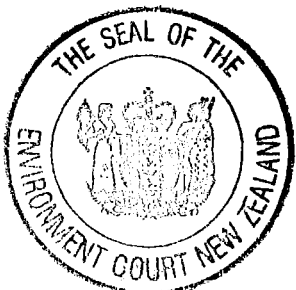
ENVIRONMENTAL DEFENCE SOCIETY INC  
(ENV-2016-AKL-000147)

COROMANDEL PROPERTY OWNERS'  
ALLIANCE  
(ENV-2016-AKL-000148)

IAN MICHAEL WERNHAM  
(ENV-2016-AKL-000152)

Other Parties:

PD & KJ SIELING  
SANFORD AND WAIOMU VALLEY HEIGHTS  
LTD  
PRESERVE NEW CHUM FOR EVERYONE  
INC  
SUE EDENS  
DEAN GLEN & SOL GLEN  
FEDERATED FARMERS OF NEW ZEALAND  
DIRECTOR GENERAL OF CONSERVATION  
CC KING & CA FIELDER  
PW WHITING-O'KEEFE  
RAYONIER NZ LTD  
NGAHUIA BLASCHEK & ORS  
MARTIN CAUGHEY FAMILY TRUST  
R & D MEAR  
NGATI TANMATERA TREATY SETTLEMENT  
TRUST  
NGATI TAMATERA TREATY NEGOTIATORS  
TE PURU NO. 5 TRUST  
TE PURU 4B3B TRUST  
NGAMOTUAROA TRUST  
MEOHAU 4A2 TRUST



A COLLIER & ORS

KAHUTOROA TUKERANGI & ORS

MG THORP & ORS

WT NICHOLLS TRUST

G & R ROBINSON

MARK STRUTHERS & ANNETTE  
WINDROSS

KOWHAI TRUST

TOKEROA FAMILY TRUST

OCEANA GOLD LTD

B & C VICKERMAN

BM & SA DAVIES

WILSON BAY LTD

DAVID SMALL

WHAUWHAU ENVIRONMENTAL GROUP  
LTD

R SIMMONS & K WARNER

GJ & JL BLAKE



---

**FINDINGS AND DIRECTIONS OF THE ENVIRONMENT COURT ON  
RESPONDENT'S PROPOSAL UNDER SECTION 293 OF THE ACT**

---

- A: To address identified matters relating to the Coastal Environment Line and the Natural Character Overlays in the Decisions Version of the proposed Thames-Coromandel District Plan, the Court confirms the proposal by the Thames-Coromandel District Council (TCDC) under section 293 of the Resource Management Act 1991 as set out in its counsel's memoranda to the Court dated 27 April 2018 and 18 May 2018 and makes the following directions:
- a) TCDC is to notify potentially affected parties of the proposed amendments, being:
- (i) all landowners (whether public or private entities) directly affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line on property owned by them, except where the property is within a settlement, being land within the Residential, Industrial and Commercial Areas or where the property is already the subject of an appeal in these proceedings;
  - (ii) all landowners (whether public or private entities) directly affected by a change, being the introduction, increase or reduction to the Decisions Version of the Natural Character Overlays on property owned by them, except where the property is already the subject of an appeal in these proceedings;
  - (iii) any holder of an exploration or mining permit on land affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line, other than Oceana Gold Limited; and
  - (iv) the twelve Iwi of Hauraki whose Treaty settlement land may be affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line or Natural Character Overlays.



- b) Notification is to be in accordance with the procedure set out in the memorandum of counsel dated 27 April 2018 and is to occur no later than 15 working days after the date of this decision.
- c) Public notification of the process being undertaken shall be given by TCDC in accordance with the draft public notice attached as Appendix E to the memorandum of counsel dated 27 April 2018 in the Informer, the Hauraki Herald, the New Zealand Herald and the Waikato Times and on TCDC's website.
- d) TCDC shall make publicly available the amendments proposed by it to sections of the Proposed District Plan which are relevant to the Coastal Environment and Natural Character overlays, including amendments resulting from consent orders made in other appeals and amendments that would result from draft consent orders which are agreed by parties and have been presented to the Court but which lie in Court pending the outcome of this process.
- e) Potentially affected parties shall have until 5 pm on the 20<sup>th</sup> working day after notification to file a submission with TCDC supporting or opposing the proposed amendments.
- f) TCDC shall summarise all submissions filed with it and provide a copy of that summary and TCDC's response to the matters raised in submissions to those submitters and to all parties to these appeals and to the Court no later than 15 working days after the submission period has ended.
- g) Persons who have made submissions in accordance with this process shall have the opportunity to join any of the existing appeals as parties under s274 of the Act, if they wish to do so, noting that TCDC undertakes to raise no objection as to the lateness of any such notice to join.
- h) The Court is likely to convene a pre-hearing conference to address any issues that may arise and make any directions necessary or desirable for the further conduct of these appeals once the summary of submissions and responses has been filed.



## REASONS

### Introduction

[2] This decision relates to the appeals against decisions of the Thames-Coromandel District Council (**TCDC**) on submissions on the proposed Thames-Coromandel District Plan (**proposed Plan**) in relation to the Coastal Environment and Natural Character topics, and in particular in relation to a proposal to amend the Coastal Environment Line (**CEL**) and Natural Character Overlays (**NCOs**).

[3] TCDC undertook a review of the CEL and the NCOs in the decisions version of its proposed plan and concluded that those overlays should be amended in order to give effect to the New Zealand Coastal Policy Statement and meet the requirements of the Act.

[4] After reviewing the options available for making such amendments, TCDC promoted the option of proceeding under s293 of the Act. This option was considered through various means, including at pre-hearing conferences before Environment Judge Kirkpatrick on 9 November 2017 and 5 March 2018 which were the subject of the Court's minutes dated 13 November 2017 and 9 February 2018.

[5] Summarised very briefly, the outcome of those conferences was general support among the parties for the Council's proposal. In turn, the Court supported advancing that proposal by directing TCDC to prepare suitable documentation that could be reviewed by the parties.

[6] That course led to a memorandum of counsel for TCDC dated 27 April 2018 setting out in detail the proposal, supported by appendices which included consultation documents. The attachments were subsequently updated under cover of a further memorandum of counsel for TCDC dated 18 May 2018. Ms Vella for TCDC took us through these documents at the hearing on 21 May 2018.

### Section 293 Process

[7] Section 293 of the RMA provides:

***293 Environment Court may order change to proposed policy statements and plans***

- (1) *After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to —*
- (a) *prepare changes to the proposed policy statement or plan to address any matters identified by the court:*



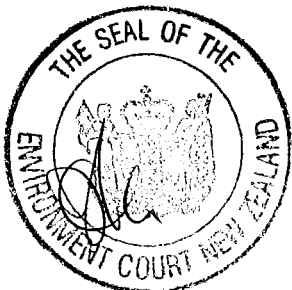
- (b) *consult the parties and other persons that the court directs about the changes;*
  - (c) *submit the changes to the court for confirmation.*
- (2) *The court —*
- (a) *must state its reasons for giving a direction under subsection (1); and*
  - (b) *may give directions under subsection (1) relating to a matter that it directs to be addressed.*
- (3) *Subsection (4) applies if the Environment Court finds that a proposed policy statement or plan that is before the court departs from —*
- (a) *a national policy statement;*
  - (b) *a New Zealand coastal policy statement;*
  - (ba) *a national planning standard;*
  - (c) *a relevant regional policy statement;*
  - (d) *a relevant regional plan;*
  - (e) *a water conservation order.*
- (4) *The Environment Court may allow a departure to remain if it considers that it is of minor significance and does not affect the general intent and purpose of the proposed policy statement or plan.*
- (5) *In subsections (3) and (4), **departs** and **departure** mean that a proposed policy statement or plan —*
- (a) *does not give effect to a national policy statement, a New Zealand coastal policy statement, a national planning standard, or a relevant regional policy statement; or*
  - (b) *is inconsistent with a relevant regional plan or water conservation order.*

[8] This provision confers a discretionary power on the Court to direct the preparation of changes to a proposed plan otherwise than using the procedure set out in Schedule 1 to the RMA for plans, plan changes and variations. It is broadly expressed. In the context of Part 11 of the RMA, the immediately preceding provision in s292 confers a power on the Court to direct a local authority to amend its plan for the purpose of remedying any mistake, defect or uncertainty. It is clear that s293 is intended to enable a greater degree of amendment than that.

[9] Case law indicates that the power under s293 is not unlimited and should be exercised cautiously and sparingly, within the foreseeable consequences of the reference out of which it arises.<sup>1</sup> The following factors have been identified to provide appropriate guidance for the exercise of the power:<sup>2</sup>

<sup>1</sup> *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508; *Federated Farmers of NZ (Inc) Mackenzie Branch v Mackenzie District Council* [2104] NZHC 2016 at [144] – [145].

<sup>2</sup> Derived from *Apple Fields Ltd v Christchurch City Council* [2003] NZRMA 1, noting that this case was decided prior to amendments to s 293 in 2009 and therefore should be treated with caution.





- (1) The possible change to the plan should arise out of and have some rational connection to a resource management issue raised by a relevant submission and referrer.
- (2) Whether the amendment is consequential on another change to the plan.<sup>3</sup>
- (3) The discretion must be exercised cautiously and sparingly for these reasons:
  - (a) it deprives potential parties or interested persons of their right to be heard by the local authority;
  - (b) careless submissions and references should be discouraged; and
  - (c) an inquisitorial process carries greater risks of making the Court's adversarial process appear partisan.
- (4) Questions of scale and complexity are highly relevant – the larger-scale and more complex the proposed amendments are the less likelihood the Court will exercise its discretion to use section 293.
- (5) Whether the amendment is supported by evidence from witnesses for more than one set of parties.
- (6) Prejudice to the parties and the public.
- (7) If the choices presented by a reference are stark but the evidence shows that a third option may better achieve the purpose of the Act and the objectives of the proposed plan, then use of section 293 could provide greater flexibility and fairness.
- (8) The avoidance of delay in the circumstances. If a Council supports an amendment beyond the scope of a reference then it can at any time promote a variation. But if it opposes an amendment then it can be two years after the proposed plan comes into force before a landowner or other party can request a plan change and much longer before a private plan change may become operative. Similarly, where the reference under consideration by the Court is the only one holding up a proposed plan becoming operative, then a variation would take much more time than the exercise of the Court's powers under section 293.
- (9) The potential number of persons affected greater than the public generally.
- (10) Who will pay the costs of the process.

### History of the proposal

[10] In the course of reporting on progress with appeals relating to the proposed Plan, counsel for TCDC advised the Court and other parties in their ninth case management memorandum dated 17 February 2017 that TCDC intended to modify its position on matters relating to the coastal environment and natural character from that set out in the Decisions Version. It had decided to do so in light of further technical assessment which

---

<sup>3</sup> As described in *Clark Fortune McDonald and Associates v Queenstown Lakes District Council* (Decision C89/2002).



indicated that its position did not satisfy all the requirements to give effect to superior planning instruments.<sup>4</sup>

[11] In particular, the CEL in the Decisions Version of the proposed Plan was different than the CEL in the Waikato Regional Policy Statement and was considered not to give effect to the New Zealand Coastal Policy Statement which establishes the basis for resource management planning in the vicinity of the coast. As well, TCDC was concerned that its application of the NCO was consequentially affected by its change of position on the CEL, that some NCOs were significantly reduced or removed in the Decisions Version in a manner which did not fulfil TCDC's obligations under the Act and that expert review had resulted in recommendations to extend some NCOs.

[12] TCDC set out a process for advising all parties affected by this change in position, including revised mapping and supporting expert analysis and position papers. This included discussion of its changed position and how that might be addressed at upcoming mediation sessions.

[13] One consequence was the identification of land previously not subject to the CEL and NCO overlays as those were included in the proposed Plan as notified. There was therefore concern to ensure that the interests of people who might be affected by TCDC's change in position were able to be covered by the appeals or otherwise able to participate. TCDC signalled at that stage its intention to ask the Court to consider using its power under s293 to address this.

[14] This intention was confirmed by a further memorandum dated 18 August 2017. On 3 October 2017 counsel for TCDC filed a memorandum setting out its detailed analysis of the likely consequences for landowners of its change in position and the most appropriate way of addressing those. In particular, TCDC advised that the number of affected landowners was significantly greater than it had originally estimated. Helpfully categorising affected landowners according to the location of their land, the numbers had been assessed to be:

- a) 40 - 60 landowners with property landward of the CEL in the Waikato RPS;
- b) 1,300 (approx.) landowners with property seaward of the CEL in the Waikato




---

<sup>4</sup> Section 75(3) RMA.

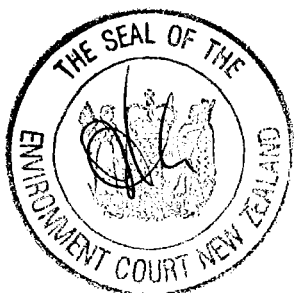
RPS, but outside of settlements and landward of the CEL in the Decisions Version of the proposed Plan;

- c) 16,000 (approx.) landowners with property within settlements but landward of the CEL in the Decisions Version of the proposed Plan;
- d) 200 landowners with property that would be wholly or partly affected by a reinstated NCO;
- e) 200 (approx.) landowners with property that would be affected by extensions to NCOs resulting from changes to the CEL; and
- f) 40 (approx.) landowners with property that would be affected by extensions to NCOs as a result of expert recommendations not relating to changes to the CEL.

[15] TCDC submitted that it would be better to address its proposed changes under s293 than by way of a variation to the proposed Plan for the following reasons:

- a) The significant investment of time and effort by all parties in negotiations to this point, including on the text of the objectives, policies and rules relating to the Coastal Environment and Natural Character;
- b) General agreement among landscape experts on the methodology for locating the CEL;
- c) The time spent on site visits to refine the mapping of the CEL and NCOs, some of which have now been agreed and made the subject of consent orders;
- d) The relative costs of the processes to parties and to the ratepayers, where it is anticipated that a s293 process will be less than that of a variation;
- e) The existing momentum of the current appeals can be maintained.

[16] Counsel for TCDC submitted that there were submissions and appeals seeking that the CEL in the proposed Plan be amended to reflect the CEL in the Waikato RPS and to



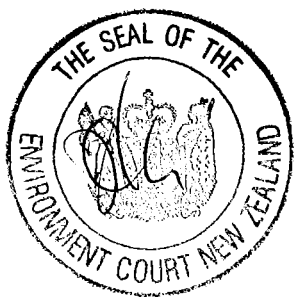
incorporate coastal towns and settlements. Further, she submitted that the proposed amendments were fairly and reasonably raised in submissions. She acknowledged that there were landowners whose properties lay landward of the CEL in the Waikato RPS but submitted that the process could include such persons.

[17] Counsel also acknowledged the potential disadvantage relating to the numbers of landowners who might become parties to these appeals through such a s293 process, but doubted the actual number would be close to the potential number because:

- a) The effect of including land within the CEL is relatively slight, involving regulation of colour and reflectivity in the Rural zone and the additional consideration of the objectives and policies for the CEL in the assessment of applications for discretionary and non-complying land use activities;
- b) The effect of reinstating the notified NCOs would affect a much smaller number of people than for the CEL and those persons have already had an opportunity to make submissions when the proposed Plan was notified or else join the appeal by the Environmental Defence Society which sought reinstatement; and
- c) The effect of extending the NCOs, mostly to align with the CEL, would apply to only a small area of land.

[18] Further progress was then made at the conferences held on 9 November 2017 and 5 March 2018, as referred to in the introduction. Comprehensive memoranda were filed in advance of those, being the sixteenth case management memorandum dated 17 October 2017 and two issue-specific memoranda dated 26 January 2018 and 2 March 2018. The memorandum dated 26 January 2018 set out in detail TCDC's response to the directions made by the Court that a draft proposal be prepared and circulated to all parties for comment, and then reported on to the Court. Various issues were raised by a number of parties and almost all were able to be resolved by agreement between those parties and TCDC. The memorandum dated 2 March 2018 addressed a number of specific matters in advance of the conference.

[19] A key matter was that during the course of considering the nature and scope of its proposal, TCDC decided that the landowners with property within settlements should not be notified. Essentially because the nature of the CEL and the NCOs, and the controls to which they relate, have little if any effect on activities and developments in the



Residential, Industrial and Commercial Areas. A consequence of this is that the numbers of directly affected persons reduces to approximately 780 in relation to the CEL and 170 in relation to the NCOs, with some overlap so that the total number likely to be notified would be 800 (approx.).

[20] One party, Mr K Vernon, remained in opposition to the use of the s293 process and considered that the proposed changes should be done by way of a variation to the proposed Plan. This is discussed below.

### **The Proposal**

[21] As presented to the Court at the hearing, the proposal consists of the following components:

- a) The identification of the persons to be notified;
- b) The maps and provisions to be notified; and
- c) The process for notification and consultation.

[22] The persons to be notified are intended to be all potentially affected persons, being described as:

- (i) all landowners (whether public or private entities) directly affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line on property owned by them, except where the property is within a settlement, being land within the Residential, Industrial and Commercial Areas or where the property is already the subject of an appeal in these proceedings;
- (ii) all landowners (whether public or private entities) directly affected by a change, being the introduction, increase or reduction to the Decisions Version of the Natural Character Overlays on property owned by them, except where the property is already the subject of an appeal in these proceedings;
- (iii) any holder of an exploration or mining permit on land affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line, other than Oceana Gold Limited; and
- (iv) the twelve Iwi of Hauraki whose Treaty settlement land may be affected by a change, being the introduction, increase or reduction to the Decisions



Version of the Coastal Environment Line and of the Natural Character Overlay.

[23] Counsel notes for the avoidance of doubt that only landowners of properties in the following zones are intended to be notified: Airfield, Conservation, Open Space, Road, Rural, Rural Lifestyle, Recreation Active and Recreation Passive.

[24] Landowners whose properties are in those zones but who are already parties to appeals in relation to the Coastal Environment and Natural Character topics will not be notified as they do not need to be to participate in this process. There are three holders of mining and exploration permits relating to affected land but one, Oceana Gold Ltd, is already a party. There are twelve iwi of Hauraki and all will be notified.

[25] It had been suggested that persons with other interests in land (such as lessees or tenants) might be notified. However desirable that might be, it appears impracticable given that neither TCDC nor Land Information New Zealand have databases which are capable of producing lists of all such people without reviewing each computer register entry individually. TCDC proposes to include in its notification letter advice to landowners that they should consider obtaining and providing the views of others with relevant interests in the land. Ultimately, it is the long-term interest of the proprietor that is likely to be most relevant to the content of the proposed Plan.

[26] The maps are proposed to be made available on the Council's website. A link will be provided. The link included in counsel's memorandum ran for a line and a half in a manner that would be daunting for most users and counsel accepted that TCDC should investigate providing an easier to use Universal Resource Locator (URL) by means of one of the many on-line methods to shorten URLs that are available. Counsel also agreed with the suggestion of Ms Vickerman for CPOA that TCDC should provide printed extracts from the on-line maps where affected persons did not have ready access to a computer and printer.

[27] The maps depict three versions of the relevant overlays: the notified version, the Decisions Version and the version now proposed by TCDC. There was general agreement that showing this progression will be helpful to all users.

[28] The provisions to be notified include all provisions which are relevant to the CEL and the NCOs. This includes:



- (a) Section 3 - Definitions
- (b) Sections 6 and 29 - Biodiversity (objectives, policies and rules);
- (c) Section 7 - Coastal Environment (objectives and policies);
- (d) Sections 9 - Outstanding Natural Features and landscapes (objectives and policies);
- (e) Sections 14 and 38 - Mining (objectives, policies and rules);
- (f) Section 15 - Development and Growth (objectives and policies);
- (g) Sections 16 and 38 - Subdivision (objectives, policies and rules);
- (h) Section 43 - Conservation (rules);
- (i) Section 56 - Rural Area (rules); and
- (j) Section 57 - Rural Lifestyle (rules).

[29] TCDC has also prepared a table of these provisions to provide an overview to guide people to the relevant provisions, given the location of these provisions throughout the proposed Plan and the fact that it is not proposed to re-notify provisions that are not under appeal.

[30] The text will be marked:

- a) With yellow highlighting to show provisions that are directly relevant to coastal environment matters that are under appeal and on which submissions may be made;
- b) With blue highlighting to show provisions that are directly relevant to natural character matters that are under appeal and on which submissions may be made;
- c) In red text to show provisions that remain in issue in appeals (that is, that have not been agreed between parties) and on which submissions may be made; and
- d) With amendments being proposed by the parties and which form the basis of draft consent orders filed with the Court (but in respect of which consent orders have not been issued) shown in ~~strikeout~~ text for deletions and underlined text for additions and on which submissions may be made, provided they are highlighted in yellow.

[31] The process for notification and consultation will commence with notification letters from TCDC to potentially affected persons setting out the process. Counsel for TCDC



agreed to amend these letters to add telephone numbers as well as e-mail addresses for contact with the organisations (Coromandel Property Owners' Alliance, Federated Farmers, Environmental Defence Society and Ngāti Maru) which have very helpfully offered to assist people in understanding the proposed changes.

[32] Upon request, these people will also receive a consultation package including the table or relevant provisions, TCDC's proposed amendments and a draft schedule of values and characteristics for the Natural Character units. This information will also be available on TCDC's website.

[33] There would then be a period, proposed to be the same 20 working days as for submissions on proposed plans, changes or variations within which persons who had been notified could make submissions. After that, TCDC would prepare a summary of all submissions received, together with its responses to the issues raised in submissions, and make that summary and its responses available to all submitters, parties and the Court.

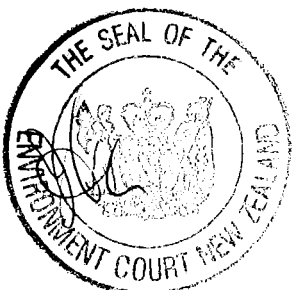
[34] At this point, the ability to predict what might happen reduces significantly. TCDC suggests that these appeals should then be the subject of a further conference so that the outcome of the submission process can be considered and the next steps can be identified.

[35] After counsel for TCDC had concluded her presentation of the proposal and the procedure to be followed, no other party sought to be heard.

### **Evaluation**

[36] The Court has not heard all these appeals in full, but we are satisfied from the material before us that the CEL and NCOs in the Decisions Version of the proposed Plan may well not give effect to the RPS and the NZCPS to a degree that is of more than minor significance and may well affect the general intent and purpose of the proposed plan. We accordingly decide that the power in s293 is available to us in relation to the present topics.

[37] Rather than defer consideration of these issues until after conducting a full hearing, we consider that it is appropriate to intervene at this stage to address these matters. There appears to be no dispute about the substantive reasons for TCDC to propose changes from the Decisions Version of the proposed Plan: ultimately all parties indicated





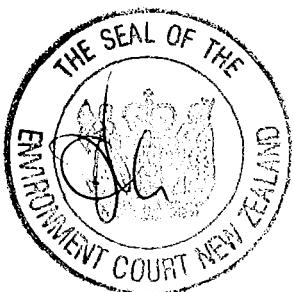
either support for TCDC's proposal or at least that they would abide the matters being advanced through a process. The matters of concern or disagreement almost all related to designing the best process.

[38] We note that the issue of whether it would be appropriate to proceed under s293 or whether this issue should be the subject of a variation to the proposed district plan was addressed in detail in the previous pre-hearing conferences conducted by Judge Kirkpatrick. These had revealed that almost all parties supported the use of the s293 procedure, albeit with caution particularly in terms of identifying who should be notified and entitled to participate and of carefully identifying the scope of the matters to be addressed by that procedure.

[39] One party, Mr Vernon, opposed the use of s293. He preferred a variation process. He said that TCDC's proposal amounted to a major change late in the piece, even though the issue had been known for some time. He said it was important that there be a process which allowed people, including the wider community, to have their say. In his view a s293 procedure would limit participation too far, especially in relation to landowners in the settlements. Asked by me what the effect would be for landowners in settlements if the CEL were shifted, he pointed out that the objectives and policies associated with the Coastal Environment would then apply to the consideration of every application for resource consent. He questioned the scope of the s293 proposal, its potential effect on the whole community and in particular on landowners in the existing settlements and the degree to which the residential sector is underrepresented.

[40] These are all proper concerns and appropriately raised. We consider that they are more related to the procedure that ought to be adopted under s293 than to the jurisdiction for exercising the power to make changes. For the reasons we traverse below, we consider that the procedure proposed by TCDC will allow affected people to have their say. We do not think that the focus of the procedure on land outside the settlements will lead to under-representation of the residential sector because the purpose of the CEL and the NCOs is not to control activities or development inside the residential, industrial and commercial areas identified in the District Plan.

[41] We are satisfied that the procedure which TCDC intends to follow is an appropriate one. The identification of affected persons has been undertaken in some detail. The issue of whether to include landowners in the settlements is resolved, in our view, by the subject matter of the process. Reviewing the provisions relating to the

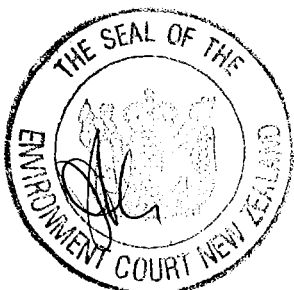


Coastal Environment and Natural Character, we do not see any clear basis on which activities and development in Residential, Industrial and Commercial Areas in the settlements will be affected to any appreciable extent. Effectively, the settlements are urban areas and the provisions which are the subject of this process are unlikely to limit what can presently occur there.

[42] The notification and consultation materials appear to be appropriate. TCDC has, we think, erred on the side of caution in preparing these extensive materials: that is consistent with what counsel told us her instructions are and means that anyone who does have an interest in these topics will receive a full package of relevant material. We note that this approach has come from TCDC, with the benefit of its consultation with other parties. The Court has not directed any of the content for this process, so that there should be no concern that the Court is entering the arena.

[43] There was some discussion about the extent to which TCDC could properly go in setting out matters that have already been dealt with in the appeals, in particular in relation to mediation and agreements arising from mediation. As the Court noted, it is essential to the mediation process that it be confidential and that the content of negotiations be protected. This applies equally to this s293 process as it does to any other circumstances. However, where a mediation has resulted in an agreement which the parties all accept can be the basis of a draft consent order to be put before the Court, then there does not appear to be any reason why the terms of that draft consent order, together with any agreed material such as might be contained in the memorandum of the parties in support of the making of the order, ought not to be made available so that affected persons can know what the current parties consider to be an appropriate outcome. Equally, if TCDC wishes to state its position on the changes proposed in this process, then it can do so. What it should not do is presume to state any other party's position unless that (and the disclosure of it) is the subject of an agreement to do so.

[44] The preparation of a summary of submissions and responses from TCDC is an important step to enable existing parties to know what reaction others have to the proposals. It remains to be seen whether there are any points of view which are not already being advanced by existing parties, but the point of this process is to ensure that the opportunity to present such points of view is made available. This meets the concern expressed in the caselaw about the potential for a s293 process to deprive affected persons of being heard. Equally, it appears that the scale of the exercise is not so great as to suggest that these matters would be better dealt with by a variation to the proposed



Plan or by a later change once the Plan is made operative.

[45] As well as the opportunity to make a submission within the s293 process, TCDC also notes that submitters may wish to become parties to existing appeals under s274. That appears to be within the scope of s274(1)(d), as such persons are likely to be able to show an interest in the proceedings that is greater than the interest that the general public has.

[46] Two procedural issues would arise:

- a) At this stage, any notice under s274 would be well outside the deadline in s274(2); and
- b) The lodging of notices under s274 now attracts a filing fee.<sup>5</sup>

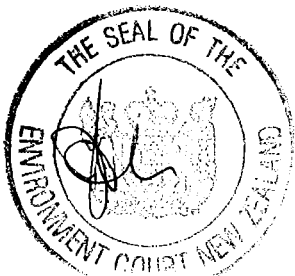
[47] As to the first matter, TCDC seeks an indication from the Court that this deadline would be waived for submitters to this process. Counsel confirmed that TCDC would not itself object. As we explained during the hearing, the Court probably cannot and in most cases ought not to grant waivers on any sort of pre-emptive basis. However, we consider it appropriate to indicate that in the circumstances of this process, the requirements for a waiver are likely to be met by any submitter to this process who seeks to join one of the existing appeals.

[48] As to the second matter, counsel for TCDC submitted that the saving provision in the Regulations<sup>6</sup> would apply so that as the proposed Plan has not proceeded to the stage at which no further appeal is possible, no fee would be payable. That appears correct.

[49] Ultimately, TCDC is bearing the cost of preparing and circulating materials and reporting to the Court. Other parties bear a delay, as had it not been for TCDC's change in position, these appeals would be being heard about now. But that is not an issue if it is generally agreed that a better outcome can be achieved by revising the CEL and NCOs as now proposed.

<sup>5</sup> Regulation 35 of and Item 4, Part 1, Schedule 3 to the Resource Management (Forms, Fees, and Procedure) Regulations 2003 as amended in 2017.

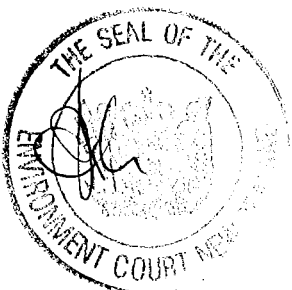
<sup>6</sup> Clause 2, Part 1, Schedule 1AA to the the Resource Management (Forms, Fees, and Procedure) Regulations 2003.



### Outcome and Directions

[50] For the foregoing reasons, to address identified matters relating to the Coastal Environment Line and the Natural Character Overlays in the Decisions Version of the proposed Thames-Coromandel District Plan, the Court confirms the proposal by the Thames-Coromandel District Council (TCDC) under section 293 of the Resource Management Act 1991 as set out in its counsel's memoranda to the Court dated 27 April 2018 and 18 May 2018 and makes the following directions:

- a) TCDC is to notify potentially affected parties of the proposed amendments, being:
  - (i) all landowners (whether public or private entities) directly affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line on property owned by them, except where the property is within a settlement, being land within the Residential, Industrial and Commercial Areas or where the property is already the subject of an appeal in these proceedings;
  - (ii) all landowners (whether public or private entities) directly affected by a change, being the introduction, increase or reduction to the Decisions Version of the Natural Character Overlays on property owned by them, except where the property is already the subject of an appeal in these proceedings;
  - (iii) any holder of an exploration or mining permit on land affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line, other than Oceana Gold Limited; and
  - (iv) the twelve Iwi of Hauraki whose Treaty settlement land may be affected by a change, being the introduction, increase or reduction to the Decisions Version of the Coastal Environment Line or Natural Character Overlays.
- b) Notification is to be in accordance with the procedure set out in the memorandum of counsel dated 27 April 2018 and is to occur no later than 15 working days after the date of this decision.
- c) Public notification of the process being undertaken shall be given by TCDC in



accordance with the draft public notice attached as Appendix E to the memorandum of counsel dated 27 April 2018 in the Informer, the Hauraki Herald, the New Zealand Herald and the Waikato Times and on TCDC's website.

- d) TCDC shall make publicly available the amendments proposed by it to sections of the Proposed District Plan which are relevant to the Coastal Environment and Natural Character overlays, including amendments resulting from consent orders made in other appeals and amendments that would result from draft consent orders which are agreed by parties and have been presented to the Court but which lie in Court pending the outcome of this process.
- e) Potentially affected parties shall have until 5 pm on the 20<sup>th</sup> working day after notification to file a submission with TCDC supporting or opposing the proposed amendments.
- f) TCDC shall summarise all submissions filed with it and provide a copy of that summary and TCDC's response to the matters raised in submissions to those submitters and to all parties to these appeals and to the Court no later than 15 working days after the submission period has ended.
- g) Persons who have made submissions in accordance with this process shall have the opportunity to join any of the existing appeals as parties under s274 of the Act, if they wish to do so, noting that TCDC undertakes to raise no objection as to the lateness of any such notice to join.
- h) The Court is likely to convene a pre-hearing conference to address any issues that may arise and make any directions necessary or desirable for the further conduct of these appeals once the summary of submissions and responses has been filed.

For the court:



D A Kirkpatrick  
Environment Judge