BEFORE THE HEARING PANEL

IN THE MATTER	of the Resource Management Act 1991
A N D	
IN THE MATTER	of a submission by Rangitāne Tū Mai Rā Trust and Rangitāne o Wairarapa Incorporated Society on the Proposed Natural Resources Plan for the Wellington Region pursuant to Clause 6 of Schedule 1, Resource Management Act 1991
A N D	
IN THE MATTER	of Hearing Stream Three – Water Allocation and Natural Form and Function

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FURTHER SUBMISSIONS ON BEHALF OF RANGITĀNE TŪ MAI RĀ TRUST AND RANGITĀNE O WAIRARAPA INCORPORATED SOCIETY

Dated 29 September 2017

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1.0 Introduction

1.1 These submissions are filed in response to a question of the Hearing Panel ("the Panel") during Hearing Week 3. On Wednesday 13 September 2017 an Opening Submission, filed on behalf of Rangitāne Tū Mai Rā Trust and Rangitāne o Wairarapa Incorporated Society ("Rangitāne"), was presented by Sarah Ongley (Counsel for Fish and Game) due to Counsel's unavailability to appear. Ms Ongley has since referred the Panel's question to Counsel for response.

1.2 Our understanding is that the Panel's question was 'whether identification of natural character areas was a jurisdictional bar to them approving the Proposed Natural Resources Plan ("Proposed Plan")?' We set out below our response to that question.

2.0 Background

2.1 To put the Panel's question in context:

(a) The focus for Rangitāne for Hearing Week 3 was on the provisions of the Proposed Plan ("Proposed Plan") that relate to water allocation and natural form and function;

(b) In our opening submission, we took the opportunity to highlight a wider issue with the Proposed Plan that we understood had already been identified by Rangitāne's planning expert, Phillip Percy, and others. That is essentially that, contrary to section 67(3) of the Resource Management Act 1991 ("RMA"), the Proposed Plan does not give full effect to the New Zealand Coastal Policy Statement ("NZCPS") and/or the Regional Policy Statement ("RPS"). Mr Percy presented evidence on this issue, including:

(i) That the NZCPS and/or RPS provide explicit direction on what must be included in the Proposed Plan, including with regard to the assessment and identification of natural character, natural features and landscapes and water quantity management; and

(ii) That those directive policies have not been adhered to in the Proposed Plan as staged implementation is proposed, which is

not provided for.[1] In order to comply with section 67(3) of the RMA, the directive policies should have been implemented in the Proposed Plan before it was notified;

(c) We submitted that:

(i) Without the detail, the Proposed Plan will not achieve its objectives, and outstanding natural character areas that are of significance to Rangitāne will not be afforded the protections that the Proposed Plan seeks to provide; and

(ii) That the Council must carry out the necessary work pursuant to its statutory obligations and add the required detail in to the Proposed Plan before it can be approved by the Panel.[2]

2.2 With that context in mind, we set out below our response to the Panel's question on jurisdiction. In our submission, the failure of the Council to identify natural character areas is a jurisdictional bar to the Panel approving the Proposed Plan in its current form, for the reasons set out below.

3.0 Statutory Framework

3.1 The key policy document for present purposes that is part of the statutory framework is the NZCPS, given it is the highest order policy document we submit has not been complied with by the Council in our opening submission (although we note that, as identified in Phillip Percy's evidence, the Council's compliance with certain policies of the RPS is also at issue). With that in mind, the key provisions of the RMA that are relevant for present purposes are as follows.

3.2 Section 56 of the RMA identifies the purpose of the NZCPS as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". The RMA further provides that other 'subordinate' planning documents –

[1] Planning Evidence of Phillip Harry Percy – Natural Form and Function – on behalf of Rangitāne Tū Mai Rā Trust and Rangitāne o Wairarapa, paragaph 21.

[2] Planning Evidence of Phillip Harry Percy – Natural Form and Function – on behalf of Rangitāne Tū Mai Rā Trust and Rangitāne o Wairarapa, paragraphs 30-31.

including regional policy statements,[3] regional plans[4] and district plans[5] – "must give effect to" the NZCPS.

3.3 Section 66(1)(ea) provides that a regional council must prepare and change any regional plan in accordance with a national policy statement, a New Zealand coastal policy statement, and a national planning standard.

3.4 In addition, section 67(3)(b) and (c) of the RMA provide that a regional plan must give effect to any New Zealand coastal policy statement and any regional policy statement.

3.5 It is also relevant that section 293(4) provides that the Environment Court may only allow departures from the NZCPS if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.

3.6 In the context of Natural Form and Function, the relevant policies contained in the NZCPS are Policies 7, 13 and 15 and the relevant policies contained in the RPS are Policies 25, 27 and 50. Extracts of these Policies were provided in Mr Percy's evidence.[6]

3.7 In consideration of the Proposed Plan, and in the context of section 67(3) of the RMA, the question is whether, in order to give effect to the NZCPS, the Proposed Plan is required to "give effect to" the policies mentioned and, if so, whether the it achieves this. In considering section 66, a related issue is whether the Council has prepared the Proposed Plan in accordance with the NZCPS (although we consider that our answer to the first issue also addresses the second).

Purpose and Principles of the RMA

3.8 The purpose and principles of the RMA must also be borne in mind when considering the question asked by the Panel, as set out in Part 2 of the RMA. Those provisions are well known so we do not propose to repeat them here. However, we do wish to highlight the following key principles that are relevant to the Rangitāne position:

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3 Section 62(3).
4 Section 67(3)(b).
5 Section 75(3)(b).
6 Planning Evidence of Phillip Harry Percy – Natural Form and Function – on behalf of Rangitāne Tū Mai Rā Trust and Rangitāne o Wairarapa, pp 9-11.

(a) Sections 6(a) and (b) which require that preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development, and the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development are "recognised and provided for".

(b) Sections 6(e) and (g), which provides that, in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and provide for":

(i) The relationship of Māori and their culture and traditions with, among other things, water; and

(ii) The protection of protected customary rights.

(c) Section 7(a) which provides that, in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" kaitiakitanga.

(d) Section 8, which provides that all persons exercising powers and functions under the RMA in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

4.0 Environmental Defence Society Incorporated v The New Zealand King Salmon Company[7]

4.1 The case *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* is in our submission directly relevant to the jurisdictional question that has been raised by the Panel. The case involved the Court's consideration of:

[7] [2014] NZSC 38.

(a) The nature of the obligation to "give effect to" the NZCPS contained in section 67(3) of the RMA, among others;[8] and

(b) Particular NZCPS policies and whether or not those policies are sufficiently directive in nature so as to require compliance in order to give effect to the NZCPS.

4.2 The *King Salmon* case is a leading RMA case and for that reason we do not propose to summarise the background to the case in any great detail. In short:

(a) The case involved an application for approval of a change to the Marlborough Sounds Resource Management Plan to allow salmon farming to take place.[9] A Board of Inquiry initially approved the plan change, which[10] decision was upheld on appeal to the High Court. Following that decision, leave was granted for the parties to appeal to the Supreme Court;[11]

(b) The plan change was approved despite an acknowledgement that the effect of that was that policies 13(1)(a) and 15(a) of the NZCPS would not be complied with.[12] The Board that approved the plan change was of the view that policies 13(1)(a) and 15(a) of the NZCPS are not determinative and that it was required to give effect to the NZCPS "as a whole"/that it was required to reach an "overall judgment" in light of the principles in Part 2 of the RMA and section 5 in particular;[13]

(c) The Supreme Court had to decide whether that was the correct approach or whether the language of policies 13(1)(a) and 15(a) resulted in an "environmental bottom line" that had to be adhered to. In other words, once the Board was aware that those policies would not be given effect to through the proposed plan change, should it have refused the change?

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8 [2014] NZSC 38 at [44].
9 [2014] NZSC 38 at [1].
10 [2014] NZSC 38 at [2].
11 [2014] NZSC 38 at [3].
12 [2014] NZSC 38 at [5].
13 [2014] NZSC 38 at [5].

Meaning of "give effect to"

4.3 In considering the answer to this question the Supreme Court considered, among other matters, what the phrase "give effect to" means. The Court stated that it "simply means implement"[14] and is a strong directive:

(a) Creating a firm obligation on the part of those subject to it;[15]

(b) When considering that, as stated in the case *Clevedon Cares Inc v Manukau City Council*:[16]

"[a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and

[b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters".

(c) Given the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored;[17]

(d) Intended to constrain decision-makers.[18]

4.4 A caveat to this, which was acknowledged by the Court, is:[19]

"The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction".

4.5 Although the Court acknowledged that the wording of particular policies of the NZCPS "leave those who must give effect to them greater or lesser flexibility or scope for choice",[20] the Court considered that policies 13(1)(a) and 15(a):[21]

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14 [2014] NZSC 38 at [77].
15 [2014] NZSC 38 at [77].
16 [2014] NZSC 38 at [77].
17 [2014] NZSC 38 at [78]. Including by the Minister of Conservation (section 28) and the Environment Court (section 293).
18 [2014] NZSC 38 at [91].
19 [2014] NZSC 38 at [80].
20 [2014] NZSC 38 at [152].

"…are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation…The policies give effect to the protective element of sustainable management".

4.6 For those and other reasons the Court held that the plan change did not give effect to the NZCPS as the proposed salmon farm would have had significant adverse effects on the area's outstanding natural attributes and, on that basis, the application should have been declined.[22]

5.0 Analysis

5.1 Mr Percy's evidence for hearing week 3 highlights the same NZCPS policies as were considered in the *King Salmon* case as policies that have not been complied with by the Council in preparing the Proposed Plan.[23]

5.2 We submit based on the *King Salmon* decision that those directive policies must be followed to give effect to the NZCPS. This includes by complying with policies 13(1)(c) and 15(c) and carrying out an assessment of the natural character and natural features and landscapes of the coastal environment of the region in the manner required. Those policies are explicit and directive. The failure of the Council to do so before notifying the Proposed Plan is, in our submission, a breach of sections 67(3)(b) and section 66(1)(ea) of the RMA.

5.3 We submit that the Council's approach of deferring the assessment and identification process is not provided for in either the NZCPS or in the RMA. Based on section 21 of the RMA, the presumption is that the NZCPS will be given effect to "as promptly as is reasonable in the circumstances".

5.4 As noted in our Opening Submission, the failure of the Council to identify natural character areas and outstanding natural features and landscapes before notifying the Proposed Plan puts natural character areas and natural features and landscapes at risk of further degradation until that assessment has been carried out. The purpose and principles of the RMA require the preservation and protection of those natural character areas, natural features and landscapes.

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21 [2014] NZSC 38 at [153].
22 [2014] NZSC 38 at [157].
23 Planning Evidence of Phillip Harry Percy – Natural Form and Function – on behalf of Rangitāne Tū Mai Rā Trust and Rangitāne o Wairarapa pp 9-11.

5.5 In our submission, the purpose and principles of the RMA further require the Panel to consider the Proposed Plan and the jurisdictional issue that has been raised through a particular lense. It is submitted that the Panel must do so whilst:

(a) 'Recognising and providing for' the relationship of Māori and their culture and traditions with areas of outstanding natural character that are of significance to Rangitāne, including Wairarapa Moana (section 6);

(b) 'Having particular regard to' kaitiakitanga (section 7) and, in particular, Rangitāne kaitiakitanga; and

(c) 'Taking into account' the principles of the Treaty of Waitangi (s 8) and, in particular, the principle of active protection.

5.6 This is particularly in light of the evidence that has been presented by Rangitāne witnesses around the degradation of waterways, whenua, and other sites of significance in their takiwā that has already occurred to date.

5.7 For those reasons and based on the *King Salmon* decision, we submit that the failure of the Council to identify areas of at least high natural character and natural features is a jurisdictional bar to the Panel approving the Proposed Plan in its current form.

5.8 To prevent further degradation of these taonga, which will be in breach of the purpose and principles of the RMA and will be a serious affront to Rangitāne kaitiakitanga, we submit that the Panel must direct the Council to go through the required assessment and identification process and include the results of that exercise in the Proposed Plan, before it can be approved. We submit that this should be done in consultation with Rangitāne and other key stakeholders to ensure that the purpose and principles of the RMA are achieved.

6.0 Conclusion

6.1 Based on the *King Salmon* decision, we submit that NZCPS policies that are sufficiently directive in nature must be complied with in order to give effect to the NZCPS and, by extrapolation, the purpose of the RMA. In particular, we submit that the effect of the Supreme Court decision is:

(a) That policies 13 and 15 must be complied with in order to give effect to the NZCPS; and

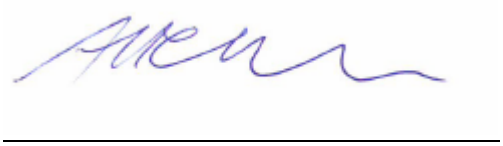
(b) Failing to do so is in breach of section 67(3)(b) of the RMA.

6.2 In addition, the Council's approach of deferring the assessment and identification process is not provided for in either the NZCPS or in the RMA.

6.3 On that basis alone, we submit that the Council's failure to adhere to policies 13(1)(c) and 15(c) before notifying the Proposed Plan is a jurisdictional bar to the Panel approving the Proposed Plan in its current form.

6.4 This view is consistent with giving effect to the purposes and principles of the RMA and in particular the purpose and principles that take into account Māori concepts such as kaitiakitanga, the relationship of Māori and their culture and traditions with areas of outstanding natural character, and the Treaty of Waitangi (including in particular the principle of active protection). In our submission, those principles require the prevention of further degradation of natural character areas and natural features and landscapes in accordance with the RMA. Certainty as to whether that outcome can be achieved by the Proposed Plan can only be provided if those areas are identified before the Proposed Plan is approved.

Dated: 29 September 2017



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