Environment Waikato Technical Report 2000/4

Natural Character Report

Concept Development in New Zealand Planning Law and Policy

Prepared for

Environment Waikato
REGIONAL COUNCIL

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planning • design • ecology

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Chairman's Foreword

This report examines the aspirations enshrined in Section 6a of the Resource Management Act, which identifies as a Matter of National Importance:

> the preservation of the natural character of the coastal environment.. and it's protection from inappropriate subdivision, use and development.

While widely recognised as an important issue, difficulty with interpreting this provision has often constrained progress with implementation.

Preservation of the natural character of the coast is a major resource management issue in the Waikato Region. Located within two to three hours drive of major population centres, coastal areas, such as the Coromandel, draw large numbers of visitors. Environment Waikato's recent State of the Environment report shows that increasing development pressures now seriously threaten the outstanding natural values that draw us to such areas.

For instance, 75% of all Coromandel beaches are already developed or partially developed, with much development very close to the shoreline. Most coastal dunes have now largely been bulldozed and covered with houses, and back-dune vegetation largely eliminated since human settlement. Similarly, the small tidal estuaries of the Coromandel are under increasing pressure from various surface water activities, demand for marinas and mooring areas, accelerated rates of infilling and loss of riparian vegetation.

We cannot hope to preserve the natural character of our coast if these trends continue. Environment Waikato therefore commissioned this report to better understand and implement Section 6a. We hope that clarifying this provision will help empower individuals, communities and management agencies working to preserve our coast's natural character.

The report provides an overview of the evolution of Section 6a and it's interpretation by the courts – from its inception in an amendment to the former Town and Country Planning Act in 1973 through to interpretation in the late 1990's. The views of various leading practitioners have also been incorporated.

It is clear from case law that Maori perspectives, expertise and traditions also bear heavily on the concept of natural character. Various Maori were consulted about incorporating these aspects within this report but it was their firm view that these aspects would need to be addressed by a separate process, perhaps various hui and subsequent reporting. It is Environment Waikato's view that this is important work that requires national attention.

Finally, I wish to thank the many practitioners from various organisations and professions who worked so generously with Rebecca Maplesden and the team from Boffa Miskell in compiling and editing this report. Thanks also to the Ministry for the Environment who provided funding to help with the distribution of this report throughout New Zealand.

Neil Clarke
Chairman

Preface

The preservation of the natural character of the coastal environment and protection from inappropriate subdivision, use, and development holds very important implications for the Waikato Region. It is a priority for the Council to ensure that the coastline is managed in a sustainable manner that will allow future generations to experience largely natural coastal environments rich in aesthetic and ecological values. However, it is equally important for the Council to ensure that the already modified coastal environments are not further degraded, and that future development will seek to maintain and enhance the natural character present in the Waikato Region.

Success in 'preserving the natural character of the coastal environment' requires first, a thorough understanding of the phrase in terms of the Resource Management Act, the New Zealand Coastal Policy Statement and other relevant planning documents. The primary purpose of this report has, therefore, been to clarify what is meant by 'natural character' in terms of case law and the views of experienced practitioners. The report also investigates the evolution of the term 'natural character' from its enactment into the Town and Country Planning Act in 1973 through to the first six years of its current application under the Resource Management Act.

The report not only provides a comprehensive analysis of 'natural character' for use by Environment Waikato staff in terms of implementing sustainable management, but also offers a 'direction' for future coastal management decision-making.

Other local authorities that have a role in preserving the natural character of the coastal environment should also find the report useful.

This report focuses upon the Parliamentary, judicial and practitioner roles that were influential during the period investigated. It should be noted that Maori perspectives, expertise and traditions are also highly relevant to the whole concept of 'natural character.' Maori perspectives on natural character could be addressed through a separate report.

Acknowledgements

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Executive Summary

The phrase *"preservation of the natural character of the coastal environment"* appeared in legislation in response to widespread concern about coastal degradation in New Zealand.

The phrase first appeared in an amendment of the Town and Country Planning Act in 1973, then in the Reserves Act 1977 and then in Section 6 (a) of the Resource Management Act 1991. Section 6(a) lists as a matter of national importance:

> *"to recognise and provide for the 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 from inappropriate subdivision, use, and development".*

The term 'natural character' has not been defined in any of the legislation. Although a definition was attempted in the draft New Zealand Coastal Policy Statement, it was omitted from the operative version because of the body of existing case law. The meaning of the term 'natural character' has been a matter of **evolving interpretation.** The report examines the legislators' intentions, subsequent case law interpretation of the phrase and views of representative practitioners. Key points are highlighted in this summary.

In the early 1970s the natural **scenic** quality of the coast was an important component in the concept of natural character. Since the late 1980s, there has also been a strong focus on ecological **values**.

Case law has interpreted 'natural character' to be a **product of nature** and does not include features constructed by man[1]. There is a view among some practitioners, however, that nature is a cultural construct, which humans define according to their own perceptions and cultural background, and this cultural component should be taken into account.

The Court has accepted that natural character goes beyond the purely visual to include **ecological and biotic systems** and the elements, patterns and processes of those systems, including the potential naturalness of an environment. The Court has not accepted a strict definition of natural, however, which includes only the indigenous or original elements and processes of the environment.

Instead, case law has regarded **introduced natural components**, such as exotic vegetation, to be part of natural character as well as indigenous components.

The degree to which the character of an environment is natural varies across **a spectrum** from indigenous and pristine at one extreme to a built-up environment at the other. Unmodified coastal environments (free from built elements) have the highest degree of natural character and therefore have the highest priority for protection and preservation. However, natural character always exists to some degree, so will always be an issue in coastal environments.

Case law has established a clear **obligation** for consent authorities to consider the natural character of the coastal environment regardless of the condition of that environment.

[1] Harrison vs Tasman District Council 1993.

Section 6(a) is a matter of national importance but preservation of natural character is **subordinate** to the primary purpose of promoting sustainable management under the RMA.

Section 6(a) contains two different and apparently contradictory considerations: - first, the preservation of the natural character as it exists at the time, and second, whether development is appropriate. Case law has given highest priority to preservation of areas with a high degree of natural character but nevertheless made it clear that preservation of the remaining natural character in modified environments must also be considered. **'Preservation'** is a stricter requirement than **'protection'** but nevertheless, the Court has ruled that *"absolute protection is not to be given to the coastal environment: that a reasonable rather than strict assessment is called for."*[2] The **appropriateness** of a subdivision, use or development is to be considered in a **national**, not regional or local, context. Nevertheless, effects on the natural character of the immediate environment are also considered, such as modification, visibility and the capacity of the locality.

[2] Environmental Defence Society v Mangonui County Council 1989.

Introduction

> *"Human pretensions have widely transformed the coastline in our day, usually without thought or compunction; mostly for the worse, not always beyond repair. Our generation has loved that coastline that was still, in our time, wilderness space" (Morton 1994).*

The quote by Morton (1994) highlights an important resource management issue prevalent in New Zealand. New Zealand's coastline is becoming increasingly degraded by development that compromises both aesthetic and ecological values.

One of the main techniques for managing New Zealand's coastal environment in a manner which seeks to avoid further degradation is through the provision of Section 6(a) of the Resource Management Act 1991 (RMA). Like its predecessor, (the Town and Country Planning Act), the RMA lists as a 'matter of national importance':

> *"the 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 from inappropriate subdivision, use, and development".*

Although the 'natural character' clause, with some variations, has been embodied into New Zealand's planning legislation since 1973, there still remains much uncertainty behind the intent of the clause. Moreover, because the term 'natural character' is defined in neither the RMA, nor the New Zealand Coastal Policy Statement, there has been noted difficulty in grappling with its interpretation.

This report seeks to clarify these issues by exploring the motives behind Section 6(a), and by providing a comprehensive analysis of the term 'natural character' through case law summaries and the views of selected practitioners. The report also looks at the definition of natural character in terms of the New Zealand Coastal Policy Statement.

The period examined is up to the end of 1997, being six years after the enactment of the Resource Management Act. Readers should note that case law is constantly evolving and decisions subsequent to 1997 should not be overlooked.

It should also be noted that, as understanding of the term 'natural character' evolves, so too will the range of expertise brought in to case law. Planners, landscape architects and ecologists have been influential as advisors and expert witnesses and this is reflected in the representative practitioners whose views are examined in this study. The views and expertise of specialist natural science disciplines are likely to be increasingly called upon as the natural process components of natural character are increasingly recognised and, so too, may expertise relating to the cultural / natural debate and community perceptions, which may yet be debated further.

Although Section 6(a) encompasses wetlands, lakes and rivers, the report focuses primarily on the coastal environment. However, the majority of information produced in this document can be related to all applicable areas.

It is important to note that this document is an extension of a student dissertation prepared by Rebecca Maplesden titled, “Preserving the Natural Character of New Zealand’s Coastline - A Judicial Analysis of Section 3(1)c of the Town and Country Planning Act and Section 6(a) of the Resource Management Act 1991". The report encompasses and précis Sections of the dissertation but, for the sake of clarity, does not refer explicitly to this earlier work.

Finally, it is also noted that the bold text contained in the report is the author’s emphasis unless otherwise stated.

1 The Evolution of 'Natural Character' into New Zealand Planning Law and Policy

1.1 Introduction

New Zealanders on the whole have an emotional attachment to the coast. A major contributor to this national identity can be expressed through the natural character of the coastline. For example, the flowering pohutukawa reaching over clear waters on a "natural" rocky coast is a distinctive reinforcement of New Zealand's identity. For many, this affiliation with the coast is almost innate. This passion that New Zealanders have for the coast, and their desire to protect the natural character has been at the heart of legislative efforts since the early 1970s (Farrow 1997).

The phrase "preserving the natural character of the coastal environment" has been a fundamental part of New Zealand's planning law since its enactment into the Town and Country Planning Act in 1973. The concept of 'natural character' has been evolving for many years through the Town and Country Planning Acts of both 1953 and 1977, Coastal Law reform, Resource Management Law reform, and the Resource Management Act 1991. In this chapter, the motives behind the phrase will be investigated to gain an insight into the **original** intent of the clause. Some of the proposed and actual changes to the clause will then be highlighted, together with the views of those responsible for its implementation, to demonstrate how the wording and intentions behind it have evolved.

1.2 The Early 1970s – A Time For Reform

1.2.1 Concern About Coastal Development

Preserving the natural character of the coastal environment has been an issue of long standing interest in New Zealand's environmental planning regime. During the early 1970s there existed, in many quarters, growing concern that New Zealand's coastline was becoming increasingly under threat from uncontrolled development, subdivision, and reclamation. Such was the extent of this concern, that the Environmental Council of New Zealand presented a report to Government in 1971 urging for a national policy to govern the use of coastal lands. The Council report recommended that a moratorium be placed on all subdivision of coastal land in the rural zones and on any new building in those zones other than that necessary to their present use[3] (Environmental Council 1980).

In May 1975, the Labour Government introduced to Parliament "The Coastal Moratorium and Management Bill" (Hansard Vol 397 pg 1076). The Bill sought to establish a nationally based coastal planning commission that would have the sole jurisdiction over planning and development of the coastal zone. Labour spokesperson, Mr Mike Moore, introduced the Bill as containing the following features:

[3] (The responsible Minister would, however, be empowered to permit any subdivision or building which would not be detrimental to the purpose of the moratorium).

"The Bill seeks to provide for the better use and conservation of the coastal zone of New Zealand and for the preparation of a New Zealand coastal plan. It defines the coastal zone as being the area of New Zealand extending 1 kilometre inland from mean high water mark, and the area extending 1 kilometre inland from the shore of any lake in New Zealand having an area of not less than 8 hectares." (Mr Moore - Hansard Vol. 397 pg. 1077).

Although this Bill was never enacted, it showed some recognition of the need for more stringent control over development and subdivision in New Zealand's coastal environment.

During the early 1970s concern over the future of New Zealand's coastline encompassed numerous issues (i.e. pollution, erosion, reclamations). The fundamental issue expressed in publications during this time was the threat of continued, unplanned and haphazard development on the coastline. The quotes listed below suggest concern that the remote, scenic and unspoilt coastal areas in New Zealand were rapidly becoming a scarce resource.

Society and Environment in New Zealand - The New Zealand Landscape - (RG Lister 1974).

"In recent decades Auckland has emerged as by far the dominant urban centre of NZ and its rapidly growing population enjoying a high standard of living has led to an accelerating demand for holiday homes within a few hours driving of the city. From North Cape to the eastern Bay of Plenty there are few areas now free of recent coastal development in the form of holiday homes (baches) along stretches of the coastline."

"The pressures have become so strong that they are now forcing the authorities to consider policies that will check further growth and at the same time lend to the purchase of some of the desirable remaining scenic stretches of the coast as reserves for public use. The stage has been reached in the process of coastal subdivision in which loss of overall amenity value in what is still an outstandingly beautiful coastal region is a very real threat."

Ministry of Works and Development (Town and Country Division 1972)

"In the parts of the coastline under most pressure from holiday populations, subdivisions for holiday houses seem to be appearing at every beach and bay. This is a matter of great concern. It is rapidly reducing the possibility of having a varied coastline - some developed, some farmed, some wild. This variety is something the holidaymaker should be able to enjoy without having to travel to some very remote area. Within the holiday regions there should be bays and stretches of coastline completely free of buildings, suitable for walking, driving, and sailing to."

Also becoming increasingly apparent during the early 1970s were the **demands** and **expectations** that many New Zealanders placed on the coastal environment. Lax planning regimes in the past had facilitated the location of baches at the convenience and enjoyment of the individual holidaymaker. It became increasingly evident that New Zealand's coastal environment could no longer sustain past development practices and the demands of a growing population. This was highlighted by a statement from the Ministry of Works and Development (Town and Country Planning Division) in 1972:

"Family holidays in simple baches near the sea or lake shore are as much an accepted part of our way of life as hogget or football. For years many of us have been able to enjoy the idyllic combination of a cheap holiday home in a small, perhaps untidy, but quite adequate settlement, with access to uncrowded beaches, clear water, and attractive natural scenery. But it is rapidly becoming clear that the conditions that made this combination possible, are passing".

Another coastal management issue apparent during the early 1970s was the future conflict between the benefits and demands of the private individual versus the rights of the public good. Morton, Thom, and Locker (1973) stressed such conflicts in their publication 'Seacoast of the Seventies':

> *"Many people are becoming weary of the extent to which our future and our land are being shaped by the profit motive. They would like to think that the things they love New Zealand for are an asset in perpetuity, available to the ordinary people who cannot afford a second home at the seaside or do not want one. They do not wish to see more of what is left consigned to the pleasure or profit of the few. Our land and its natural quality are more sacred than the right of the individual to exploit it or the institutions which make decisions about its use".*

This view was also expressed by politician, Mr Moore, in his introduction to the 1975 Coastal Moratorium and Management Bill (Hansard, Vol 397 pg 1077):

> *"There is a conflict between those who see growth as a means of increasing profit and those who care for the kind society we will bequeath to future generations. How much coastline and seafront must be sacrificed for ever before we learn that, in issues of profit versus environment, environment must win?"*

A similar egalitarian philosophy seems to have formed part of the directive of the 1972 report on coastal development issued by the Town and Country Planning Division of the Ministry of Works.

1.2.2 Ministry of Works Report on Coastal Development 1972

The 1972 Ministry report highlighted many of the disturbing trends in coastal subdivision and development in New Zealand's coastal environment. The critical planning issues in coastal areas identified in the report were as follows:

- obtaining a desirable pattern of rural and urban land use
- preserving or creating an appropriate character of urban development at each settlement
- safeguarding the land that will be needed as public reserve in the future.

The report contributed greatly to the growing public awareness of the problems inherent in the control and design of development at the coast, the conflict between public and private interests, and the respective roles of central and local government[4]. The report contained key value judgements, which appear to have been directed by central Government policy at this time. Such value judgements were founded upon the following factors:

1 New Zealand's Coastline is a Matter of National Interest

> *"What happens in New Zealand's shoreline areas is a matter of **national interest**. Development in these areas affects a national resource of high quality and fixed quantity which contributes to the whole nation's physical, mental and - through international tourism - economic well-being. At a personal level too, the concern is nation-wide, for we are so mobile as a people that a development in say Northland is likely to affect people all over the North Island" (Ministry of Works 1972).*

2 Needs of the Future Holidaying Public are to be Favoured

> *"In most instances, the "future holidaying public" is the group to be favoured. The emphasis is on the future rather than the present public needs because at this point in time it is possible to see that future needs are the most important. At*

[4] Statement by the Minister of Works and Development 1974.

present there are still undeveloped bays, large stands of native bush and groves of pohutukawas, and still sufficient space at the coast for people to enjoy themselves without impinging on other people's "space". Many of the recommendations in the report aim to do no more than suggest methods by which a similar range of opportunities to those now open to some three million New Zealanders can still be available as the population grows." (Ministry of Works 1972).

3 The Appearance of the Coastal Environment

"The third value judgement concerns the place of aesthetics in the development of the coast, and the particular aesthetic result to be aimed at. The line taken in this report is that in most coastal areas appearance is important, particularly where the ***natural scenic quality*** *of the land is high but also elsewhere, for people on holiday who have the time and inclination to enjoy the landscape for itself. As to the kind of landscape needed, the report makes the assumption that the* ***natural landscape*** *should be dominant, and that where this is not practicable* ***the man-made landscape should make the most of natural features and vegetation****. It further assumes that in the interests of creating holiday environments that are quite distinct from towns and cities the form of development should emphasise* ***informality****. A reason for aiming for an environment dominated by natural features is that there is a good chance of this policy being successful...." (Ministry of Works 1972).*

4 Choice in the Coastal Environment

"The fourth value judgement is that people should be able to experience ***variety*** *and to exercise* ***choice****. To recognise this the planning of the coast must help existing variety to survive - for example, by holding some areas in their virgin state, despite pressure for development, and promote new variety. For example, by allowing for cheap and perhaps unattractive baches as well as good quality houses and motels." (Ministry of Works 1972).*

A statement by the Minister of Works and Development in 1974 held that some of the specific recommendations were implemented shortly after the 1972 report's publication. Implementation, presumably, was through District Planning Schemes, the designation and acquisition of reserves, and the enactment of Section 2B of the Town and Country Planning Act 1953. Many of the other recommendations listed in the report were intended more as guidelines on coastal planning and were directed primarily at the developers and subdividers; the local authorities responsible for planning control; the individual using the coast; and the public at large.

1.2.3 Enactment of 'Natural Character' Into the Town and Country Planning Act 1953.

In April 1973, the Acting Minister of Works and Development issued a statement that the full powers of the Town and Country Planning Act would be used by the Government to protect coastal and lakeshore areas. The Ministry further emphasised that there was extensive power in the legislation to safeguard the public interest. That same month Government introduced a national policy on land. The intention of the policy was not to decree how each part of the coastline was to be used, but to provide a series of principles on which Government policies and actions could be based when framing legislative changes; exercising its powers under existing legislation; or when allocating finance (Statement from Minister of Works and Development 1974). It is likely that these national policy elements lent impetus to the wording of Section 2B of the Town and Country Planning Act 1953:

a) Recognition that coastal land is a matter of **national importance**, but of fixed quantity.
b) Provision of a wide range of recreational opportunity and experience on the coast.

c) Retention in sufficient quantity of the native coastal flora and fauna in its **natural state** as well as the **unique** and the **typical** in coastal scenery.
d) Definition of land needed for urban uses and land to be excluded from these.
e) Ensuring that any development of coastal land for urban and holiday purposes is in **sympathy** with the landscape and makes the most of each site's characteristics.
f) Protection of dune areas to maintain stability of coastal land.

Seven months later in November 1973, the Government followed the announcement of its national policy with an amendment to the Town and Country Planning Act 1953. The newly created Section 2B of the Act stated:

> *"The following matters are declared to be of national importance and shall be recognised and provided for in the preparation, implementation and administration of regional and district schemes:*
>
> *a) The preservation of the natural character of the coastal environment and of the margin of lakes and rivers and the protection of them from unnecessary subdivision and development..."*

The term 'natural character' was not specifically referred to in any of the central Government reports prior to its enactment in the Town and Country Planning Act in 1973. However, it can be argued that the clause was to encompass some of the broader issues relating to the future condition of New Zealand's coastal environment. Reference in the early 1970s reports to the words "variety", "choice", "informality", "unique", and "typical" clearly indicate central Government's intention to preserve areas of undeveloped coastline so that New Zealanders, as a matter of choice, could experience a varied coastline - i.e. natural and modified.

The various **types** of coastline to be preserved for New Zealanders are represented by the word 'character' which implies an obvious distinction between each environment. Clearly, however, it is the **natural** elements contained in all types of coastal environment that require preservation. This is made explicit in the 1972 Ministry of Works and Development report which states *"the natural landscape should be dominant, and that where this is not practicable the man-made landscape should make the most of natural features and vegetation".* It would seem that the intended clause 'natural character' was intended not only to protect unmodified or predominantly natural landscapes to create variety and choice within coastal environments, but also to preserve the existing natural qualities present in modified coastal environments.

The words "natural scenic quality", "appearance", "amenity values", "coastal scenery", repeatedly used in central Government reports prior to the enactment of Section 2B, indicate that the fundamental component underlying the term "natural character" was the **natural scenic qualities** or 'naturalness' of the coast. Reference to the health and viability of ecosystems, (which now is considered a fundamental component of natural character and is encompassed in the RMA), was not reckoned at the time to be a paramount issue.

The enactment of Section 2B into the Town and Country Planning Act placed a very strong legal obligation on each planning authority to give due weight to the matters of national importance when judging specific development applications and when promoting change to district schemes (Statement by Minister of Works and Development 1974). The amendment of the Act also provided a reference point which could not be ignored by the Town and Country Planning Board in reaching its decisions.

It is also important to note that the clause "preservation of the natural character of the coastal environment" was not limited to inclusion in the Town and Country Planning Act, but also appeared in the Reserves Act of 1977. Although not implemented until 1977, the drafting of this clause took place in 1974, soon after the enactment of the

term ‘natural character’ into the Town and Country Planning Act. One of the ‘general purposes’ of the Reserves Act 1977 in terms of Section 3(1)(c) is:

> *Ensuring, as far as possible, the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands, lakeshores and riverbanks, and fostering and promoting the preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development.*

The promulgation of Section 2B indicated a serious governmental commitment to coastal conservation which had not, until the early 1970s, prevailed in New Zealand’s political arena. The Minister of Works and Development 1974 Statement on Coastal Development further highlights the importance of the early 1970s in the move towards coastal preservation. It was stated “more has been done to look after our coast and lakeshores in the last eighteen months than over any other period in our history - irrespective of the Governments in power”.

However, Hilton (1994) argues that Government policy (including Sections 2B and 3(1)(c) of successive Town and Country Planning Acts and the national policy on coastal land issued by the Ministry of Works and Development), mostly failed to initiate the orchestrated management of coastal resources. Moreover, Hilton comments that s.3(1)(c) was misinterpreted and undermined by the Planning Tribunal in the absence of specific government policy. This in turn resulted in the “Purpose” of the Town and Country Planning Act (with respect to the coastal environment) never being widely achieved. The Planning Tribunal and courts adopted a case-by-case approach, but decided that the protection of the coastal environment needed to be explicitly recognised in zoning with a sufficient need for development having to be demonstrated to outweigh this requirement.

1.3 Coastal Law Reform

1.3.1 New Principles of Integrated Resource Management and Ecology

In September 1988, the Government directed that the Coastal Legislation Review that was then being undertaken by the Department of Conservation, be completely integrated with the Resource Management Law Reform. Not only did this avoid overlap between the two reviews but recognised that there was a need for an integrated approach to resource management.

Submissions received by the Ministry for the Environment[5] regarding coastal law reform encompassed new issues not previously touched on during the early 1970s reform. One such issue was that the **intrinsic values** associated with the coast should be protected and preserved. Other submissions emphasised the view that the coastal environment should not be separated from other systems. The protection of natural values in the coastal environment continued to receive strong public support.

Submissions also stressed that objectives for coastal management should be adequately aligned with general resource management objectives, specifically spelled out as part of the Resource Management Act, or as part of a separate coastal management statute. For example, provisions such as the “preservation of natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unreasonable or insensitive subdivision and development”[6].

[5] Ministry for the Environment (1988) People, Environment, and Decision Making.
[6] Ministry for the Environment (1988) People, Environment, and Decision Making.

A report published by the Ministry for the Environment in 1988[7], outlined some options for reform of the current legislation. The report established that the law relating to coasts was in urgent need of reform to remove ambiguities and to enable effective management to develop. One of the fundamental problems with the legislation and administration of the time was inadequate protection of the natural values of the coast. The report conceded that reformed law would need to take account of the coast as a dynamic transition zone, and of the concentration of natural values in the coastal environment. However, the Ministry's review team did clearly emphasise that the values associated with natural character of the coast identified in Section 3 of the TCPA might be in conflict with values placed on the use of coastal resources[8].

1.3.2 National Objectives for Coastal Management

The Ministry for the Environment report (1988) remarks on a divergence in opinion between review team members in respect to:

i) differences between coasts and other environments and to what degree these differences warrant separate management
ii) the extent to which coasts should be managed for sustainable development versus management to maintain their natural character.

However, it was established by the review team that the physical and biological characteristics of the coastal environment in part determined appropriate management systems for the coast. Accordingly, a set of principles was developed from considering the nature of the coast, and from principles that were embodied in previous legislation (notably the TCPA and the Water and Soil Conservation Act). The review team believed that all the principles identified below were worthy of inclusion in legislation (although not necessarily with the same wording). National objectives for coastal management would thereby be clearly stated. Specific reference to natural character of the coastal environment are contained in principles a, b and e.

a) Conserving the Natural Character (including the mauri) of the coastal and marine environments

Explanation
*"This principle derives from S.3(1)(c) of the TCPA. Case law indicates that the term 'conservation' **does not preclude development**; rather it implies that the diversity, fragility and dynamics of coastal environments should be given adequate consideration in development planning and consents to processes".*

b) Maintaining the sustainability of coastal and marine ecosystems

Explanation
"The consent of sustainability is central to RMLR. It stresses the dimension of natural character that exists over time, and identifies that the pattern of development must permit the continuance of resources".

e) Conserving a diversity of the country's coastal resources, including examples of all representative ecosystems and habitats and the genetic diversity of species.

Explanation
"This principle forms the basis for any system of protected natural areas. This in turn is a part of the maintenance of natural character. To be achieved, a better understanding of New Zealand's coastal ecosystems will be necessary".

The remaining objectives contained in the Ministry's 1988 report are listed as follows:

[7] Ministry for the Environment (1988) Resource Management Law Reform, Working Paper No. 23.
[8] Ministry for the Environment (1988) Resource Management Law Reform, Working Paper No. 23.

c) *Recognising coastal environments as unified and dynamic systems characterised by complex interactions.*

d) *Ensuring the survival of rare, endangered and highly valued species of plants and animals and the protection of unique or special landforms.*

f) *Ensuring that the rights to use coastal resources are given in a just manner, and in a way which provides benefit to society.*

g) *Protecting and improving public access to and along coasts.*

h) *Placing necessary restrictions on public access to protect sensitive coastal areas from damage; preserve traditional rights; and to protect domestic privacy.*

i) *Giving effect to the principles of the Treaty of Waitangi.*

The national objectives for coastal management outlined above denote a change in focus when compared to the principles developed for the coast by the Ministry of Works and Development in 1973. Issues concerning the scenic quality of the coastal environment (paramount in the early 1970s) were, in some respects, superseded by some of the key principles emerging within international documents[9] which sanctioned the sustainable development paradigm. Key words and phrases such as "genetic diversity", "sustainability of ecosystems" and "intrinsic values of ecosystems" became fundamental issues in respect to coastal management. Once incorporated in the Resource Management Act, the term 'natural character' became a 'means' to the overall goal of sustainable management. The addition of the ecological component within the meaning of the term 'natural character' can also be attributed to the Department of Conservation's role in coastal management that emerged during the late 1980s.

1.4 Resource Management Law Reform

1.4.1 The Bill As First Introduced

In December 1989 the Resource Management Bill was introduced to Parliament under the Labour Government. The Bill had been shaped through a significant public consultation process with over 3500 submissions being received prior to its introduction (Palmer 1992).

During introduction speeches on the Bill, the Hon Helen Clark, commented specifically on the issue of natural character. Her comments were more akin to the Ministry of Works and Development's points made in the 1970s than those made by the Ministry for the Environment from 1988. She stated: (Ross 3)

> *The provisions pertaining to coastal management clarify a confused area of the law. Under those Sections, the Minister of Conservation will prepare national coastal policy statements, which will aim to see that the coastline maintains its natural character. It would be foolish if the Opposition argued against the national policy statements for the coastline. It is important that there is consistent provision throughout New Zealand for maintaining the natural character of the coast. Many countries regret what has happened to their coastline - inappropriate development, too many marinas, development too close to the sea, not enough land put aside for reserves for the public to be able to enjoy the coastline - and strong national policy in that area is essential."* (Hansard Vol. 503 - pg 14174).

[9] International Documents include: Agenda 21, Brundtland Report, IUNC - Caring for the Earth.

The structure and content of Part II of the Resource Management Act was notably different in its first reading to Parliament. Part II of the Bill comprised the following three Sections:

- The 'Purpose' (Section 4), contained eight 'considerations' important in achieving the purpose of sustainable management
- The 'Principles' (Section 5) reflected the range of social, economic, cultural, physical and biological factors relevant to resource management decisions
- Section 6 incorporated the Treaty of Waitangi.

Of particular consequence was the clause, "preservation of the natural character of the coastal environment," which changed considerably from its standing in the former Town and Country Planning Act. The clause was no longer held as a "Matter of National Importance" but was incorporated into one of the seven 'Principles' of which persons exercising functions and power of the Act "shall have regard for".

Another notable change prevalent in the first reading of the Bill was the use of the word "maintenance" which replaced the word "preservation" contained in the TCPA.

Section 5. Principles:

1) To achieve the purpose of this Act, all persons who exercise functions and powers under this Act shall have regard to the importance of -

e) The maintenance of the natural, physical, and cultural features which give New Zealand its character, and the protection of them from inappropriate subdivision, use, and development including -
   i) The maintenance of the natural character of the coastal environment and the margins of lakes and rivers
   ii) The retention of natural landforms and vegetation
   iii) The recognition and protection of heritage values including historic places and waahi tapu.

2) Without limiting subsection (1) or precluding the use or development of coastal marine areas where appropriate, all persons who exercise functions and powers under this Act in relation to the coastal marine areas shall have particular regard to the importance of the maintenance of the natural character of the coastal environment.

The drafters of the Bill made explicit in Section 5(1)(e) the components that contribute to New Zealand's overall "character" - those being natural, cultural, and physical features. It seems clear that the first two clauses of Section 5(1)(e) deal specifically with the natural and physical components of New Zealand's character, and the latter (clause (iii)) with cultural components. This section of the Bill therefore distinguished between the natural and cultural components that contribute to New Zealand's character. The term "natural character" was interpreted within this section as a constituent of New Zealand's overall "character".

Also of interest in the Bill as first introduced, is the importance that Parliament placed on the issue of "maintaining the natural character of the coast". This is seen through the inclusion of the natural character clause in both Section 5(1) and Section 5(2), with the latter according specific reference to coastal marine areas. The inclusion of clause 5(2) clearly reflected Parliament's intent to emphasise that the principle objective in coastal management is the maintenance of the natural character of the coast (Resource Management Bill - Ministry for the Environment (MfE) Departmental Report Position Paper: No.6).

1.4.2 Ministry For The Environment - Comments and Recommendations On The Bill As First Introduced

Following the introduction of the Bill in 1989, the Select Committee received some 1400 submissions. The Ministry for the Environment produced several reports outlining the key issues which arose from analysis of the public submissions. Some of the comments included in these reports, of specific relevance to Section 5(1)(e)(i) and 5(2), are outlined below:

Priority and Weighting Afforded to 5(1)(e)(i)

- "The submission from the New Zealand Law Society pointed out the obscurity of the meaning of the current draft of 5(2) and suggested that if the intention was to give "special priority" to the maintenance of the natural character of the coastal environment, then this should be made clearer". *(Resource Management Bill - MfE Departmental Report Position Paper: No.6).*

- "There may be special circumstances where other factors outweigh the importance of protection of the coast. The local decision maker must be free to consider these. If this is not intended, then a clear decision could be made to make the main principle in the coastal marine area, 5(1)(e)(i). The reality is, however, that other factors will almost always be relevant and this should be reflected in and catered for by the law". *(Resource Management Bill - MfE Departmental Report Position Paper: No.6).*

- "Stating in a new clause that, in the coastal marine environment 5(1)(e) has "priority and particular weight" adds nothing to what is already implied by a strongly worded 5(1)(e)(i) relative to other principles. It just adds confusion as to the interpretation of clause 5. A further consequence of putting a priority in the coastal marine area is that it opens other areas up for similar treatment. For instance what special priority should be accorded to 5(1)(f) in matters of Maori. Would it follow that in natural areas which are relatively unmodified, special regard should be had to principle 5(1)((b)(ii)? It also brings into question the relationship between clause 5(1)(e) and clause 6. Such a change would go against the nature of balance inherent clause 5". *(Resource Management Bill - MfE Departmental Report Position Paper: No.6).*

Replacing the word "Maintenance" with "Preservation"

- "The report recommends an amendment to clause 5(1)(e)(i) so that it relates to the "preservation" rather than the "maintenance" of the natural character of the coastal environment. It is a strongly worded principle and gives clear direction to decision-makers as to the importance Parliament places on the protection of the coast". *(The Ministry for the Environment Departmental Report on the Resource Management Bill - June 1990).*

- "If the Committee chose not to accept the move to "preservation" it may wish to consider the retention of the original clause 5(2), notwithstanding the comments from the New Zealand Law Society and others" *(Resource Management Bill - MfE Departmental Report Position Paper: No.6).*

Possible Deletion of Clause 2

- "The clause was intended to provide a particular principle applying to the management of the coastal marine area. Because of the allocation dimension involved in the management of Crown foreshore and seabed, it was decided there needed to be an extra push to achieving conservation objectives. However, the submissions have questioned the appropriateness, particularly in view of the qualification about precluding appropriate use or development, and the principle in clause 5(1)(e). Our view is that submissions make a case for change". *(The*

Ministry for the Environment Departmental Report on the Resource Management Bill (June 1990).

- "With the recommended change to "preservation of the natural character" as opposed to "maintenance of natural character", we believe that it would be too strong a test to insert these new words into the existing clause 5(2). To do so would displease those critics of the existing provision (The Ministry for the Environment Departmental Report on the Resource Management Bill (June 1990). With the rationalisation of clause 5(1) and the inclusion of the "preservation" concept, we believe 5(2) should be deleted". *(The Ministry for the Environment Departmental Report on the Resource Management Bill (June 1990).*

At the outcome, the Ministry's recommendations were as follows:

e) change "inappropriate" to "unnecessary"
   i) change: "maintenance" to "preservation"; add "wetlands and geothermal resources", rephrase to "lakes and rivers and their margins"
   ii) change: to add "indigenous vegetation and landscapes"
   iii) remove "recognition of".

- That clause 5(2) be deleted.

1.4.3 Select Committee Report On The Resource Management Bill As Introduced

In August 1990, the Select Committee on the Resource Management Bill reported back to Parliament. The consideration of evidence and committee recommendations in relation to Sections 5(1) and (2) is outlined below.

- "Submissions expressed concern that traditional terminology is being abandoned in the new legislation. Submissions, particularly from the legal profession, stressed that existing words and phrases have well established meanings and therefore should be used in this legislation".

- "The Committee agreed that existing wording should be used where it is compatible with the policy intent of the bill. The committee, however, does not believe that the principles contained in clause 5 should be replaced by "matters of national importance", as contained in the Town and Country Planning Act 1977. The committee thought it is preferable for the Bill to provide (in the form of principles) a list of the durable matters to be taken into account".

- "In some cases the committee recommends returning to **existing wording**, 'coastal management' being one example. The committee thought it important to return to the term "unnecessary subdivision use and development" in place of "inappropriate subdivision use and development" as used in the bill. The committee also accepted that the "maintenance of the natural character of the coast" should be returned to "preservation of the natural character of the coastal environment" as used in Section 3 of the Town and Country Planning Act 1977."

- "Despite a number of submissions expressing the concern about clause 5(2) as relating to the coastal marine area, the committee took the view that the coast justifies **special recognition** because of its special conservation values and its status as Crown land".

1.4.4 The Resource Management Bill - Second Reading

In 1990 the Resource Management Bill was read for the second time under the Labour Government. The new changes to the Bill are seen as follows:

Principles

1) To achieve the purpose of this Act, all persons who exercise functions and powers under this Act shall have regard to the importance of -

    e) The maintenance and **enhancement** of the natural, physical, and cultural features which give New Zealand its character, and the protection of them from **unnecessary** subdivision, use, and development including -
        i) The **preservation** of the natural character of the coastal environment, **wetlands, and lakes and rivers and their margins**
        ii) the retention of natural landforms and vegetation
        iii) the recognition and protection of heritage values including historic places and waahi tapu.

2) Without limiting subsection (1) or precluding the use or development of coastal marine areas where appropriate, all persons who exercise functions and powers under this Act in relation to the coastal marine areas shall have particular regard to the importance of the **preservation** of the natural character of the coastal environment.

The second reading saw the reinstatement of the words "unnecessary" and "preservation" contained in Section 3(1)(c) of the Town and Country Planning Act. The return of the word "preservation" and the retention of Section 5(2), despite the Ministry's recommendation to delete it, reflected a serious commitment by Parliament that the natural values contained in the coast were to be given special recognition. The Rt Hon Geoffrey Palmer firmly endorsed the change to the word "preservation" in stating:

> *"One other change to clause 5(2) is the return of the use of "preservation of the natural character of the coastal environment", and that reinforces the Government's recognition of the conservation values of the New Zealand coastline. The Bill retains an even ranking of principles." (Hansard - Vol 510, Pg 3951).*

Although contained in the Town and Country Planning Act for almost 17 years the change to the word "preservation" was not without critique from members of the opposition. Mr Douglas Kidd during the second reading of the Bill commented specifically on the word "preservation" as being somewhat contradictory in nature. He stated:

> *"The word "preservation" is clearly understood, and relates to museums, formalin, and the like. It is not a concept of living and development, and it does not presuppose a dynamic and responsive view of the position despite the dynamic nature of the coastline itself in physical terms. If one is preserving something one will have great difficulty in introducing "appropriate use and development". I do wonder how that provision will work? (Hansard - Vol. 510 Pg 4123).*

Other fundamental changes to clause 5(1)(e)(i) were the inclusion of lakes and rivers, (and not just their margins), and the introduction of wetlands.

1.4.5 Review Of the Bill Under the National Government

In the 1990 general election the Labour Government was defeated and the National Party formed government. According to Palmer (1992), the Hon Simon Upton, the new Minister for the Environment, was a supporter of the general thrust of the Resource Management Law Reform project. In 1990, a review group was appointed by the Government to review the Bill and make recommendations. The group published a 62-page discussion paper, which received 160 submissions. The discussion document reveals that the National Government was committed to preserving the natural

character of the coastal environment through legislative measures. The Hon Simon Upton stated in the report:

> *"There are certain matters which New Zealanders have long regarded as important elements which ought to be particularly protected from unnecessary development. These include the preservation of the natural character of the coastal environment and waterbodies, the protection of landscape and heritage values, and the relationship of the Maori and their ancestral lands and other taonga. The recognition of the importance of these matters has been a part of our law for a considerable period and the new Bill will continue to provide for them. The Review Group proposes that these matters should be adequately recognised by placing them in a separate section of the Bill which will reflect their proper place and significance" (Resource Management Review Group, 1990).*

Some of the criticism of the Bill related to the repetition of certain matters in clause 5, in particular, the substantial duplication of provisions relating to the coast. Consequently, it was recommended that clause 5(2) of the Bill be deleted, as such matters would be contained in clause 5(a)[10].

Following this report a 186-page review was published in February 1991. The findings in the report applicable to preserving the natural character of the coastal environment are listed as follows:

Matters of National Importance
"To emphasise the importance to be attached to the matters in clause 5(a), the review group suggested that it should follow immediately after the purpose of the Bill (clause 4) and should adopt the words of Section 3 of the Town and Country Planning Act to "recognise and provide" for the various items as "matters of national importance". The review group argued that there had been a substantial body of case law developed by the Planning Tribunal and the Courts in the interpretation of Section 3 of the Town and Country Planning Act. It was considered appropriate therefore that the benefit of some of that case law be retained by adopting language which is similar to that used in Section 3" (Review Group 1991).

The wording "Recognise and Provide For"
"The review group suggested that the use of the expression "recognise and provide for" provides an obligation which is too absolute in its nature. The review group has carefully considered this suggestion and is of the opinion that no undue difficulty should arise. The phrase has been used in the Town and Country Planning Act without difficulty and has not been construed as imposing an absolute obligation. Under the review group's recommended draft, the section will have to be examined and applied in the light of the overall purposes and principles of the Act. It also contains limitations within its own subclauses (notably in respect of the unnecessary subdivision, use and development of the coastal environment and in the protection of outstanding natural landscapes). The purpose of this section is to clearly establish the relative priority and weight to be given to the specified matters. It should be noted that to recognise and provide for the matters stated does not necessarily involve provision being made in plans but may include other means" (Review Group 1991).

Maintenance and Enhancement
"The broad phrase "the maintenance and enhancement of the natural, physical, and cultural features which give New Zealand its character" has been deleted. The review group considers that this phrase is too uncertain and too wide in its scope to be included in a section requiring the recognition of matters of national importance" (Review Group 1991).

[10] Section 5 (a) contains the natural character clause as read in the third reading of the Bill.

The Principles

"In their hierarchy, they come after purposes and matters of national importance but their significance should not be under-estimated. In particular, the principles emphasise and explain the concept of sustainability and its biophysical dimensions" (Review Group 1991).

The House of Representatives Supplementary Order Paper No 22 was released on 7 May 1991. The clause 'preservation of the natural character of the coastal environment' was reinstated as a Matter of National Importance with almost identical content to its listing under the Town and Country Planning Act 1977.

"5. Matters of National Importance - In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise and provide for the following matters of national importance:

(a) The 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 **unnecessary** subdivision, use, and development:"

On Tuesday 2 July 1991, a House of Representatives Supplementary Order Paper was released which revealed a fundamental last minute change to the natural character clause to replace the word "unnecessary" with "inappropriate".

"5. Matters of National Importance - In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise and provide for the following matters of national importance:

*(a) The preservation of the natural character of the coastal environment (including coastal marine area), wetlands and lakes and rivers and their margins and the protection of them from **inappropriate** subdivision, use, and development".*

The report of the Planning and Development Committee on Supplementary Order Paper No. 22 refers specifically to this change in stating:

> *"With regard to the actual matters of national importance the committee heard a number of arguments both for preservation and protection of specific aspects of the environment and for the need to have access to those resources for development. The committee decided that the overall natural character of the coastal environment needs preservation.*

The committee therefore considered that in clause 5(a) the word "unnecessary" should be changed to "inappropriate" in recognition of the body of case law." *(Report of the Planning and Development Committee on Supplementary Order Paper No.22).*

This change, however, did not receive commendation from members of the Opposition. Member of Parliament, John Blincoe (Nelson) commented:

> *"On the subject of matters of national importance I have to say I was not particularly enthusiastic about the division of what was formerly one set of principles - one being matters of national importance that, broadly speaking, are deemed to be very important, and the other matters that, broadly speaking are deemed to be merely important. However, in the interests of co-operating with the Government, the Opposition accepted that formulation and the hierarchy. Having done that it thought that some changes ought to have been made. For instance, on the matter of the subdivision of the coast and natural features and landscapes, the Opposition felt that the term 'unnecessary subdivision' should have remained, but it has been changed to inappropriate". That is unfortunate." (Hansard - Vol. 526 Pg. 3026).*

To conclude this section, the wording of s.6(a) in the Resource Management Act 1991 differs from that contained in s.3(1)(c) of the TCPA in two significant ways. The first difference was the changing of the word 'unnecessary' to 'inappropriate', and the second difference was the provision in Section 6(a) of a comma between the preservation element and the protection element.

1.5 Conclusion

This chapter has investigated the evolution of the 'natural character' phrase since its enactment into the Town and Country Planning Act in 1973, through to its current status under Section 6(a) of the Resource Management Act. The main conclusion that can be drawn from this chapter, is that the components contributing to the definition of natural character, have and are, continuing to evolve. Evidence suggests that 'natural character' when first enacted into the Town and Country Planning Act of 1973, sought to preserve solely the visual aspects of New Zealand's coastal environment. The importance of ecological values in terms of natural character did not become apparent until the late 1980s. Research also suggests that 'natural character' focused heavily on the indigenous/native fauna and flora in its natural state .

This chapter has also demonstrated that the term 'natural character' changed significantly during the resource management law reform process. However, when finally enacted as Section 6(a) of the Resource Management 1991, the clause was similar in wording to that of the previous Town and

Country Planning Act. Apart from the overall 'Purpose' of the Act changing, the fundamental differences were the changing of the word 'unnecessary' to 'inappropriate', and the provision in Section 6(a) of a comma between the preservation element and the protection element. The need to preserve existing case law under the Town and Country Planning Act was a fundamental reason why the clause remained largely unchanged.

1.6 Chapter Summary

The Political Scene

Coastal degradation emerged as a serious issue in the early 1970s. The Government of the day recognised the issue and made a commitment to coastal conservation.

Concern about the coastal environment was encapsulated in law reform of the time with the phrase *"preservation of the natural character of the coastal environment":*

- As a matter of national importance in a new section 2B in the 1973 amendment of the Town and Country Planning Act 1953
- In the Reserves Act, first drafted in 1974 soon after the amendment to the Town and Country Planning Act.

By 1988 there was concern that **coastal legislation and administration was inadequate.** Review of the coastal legislation was integrated with the resource management law reform process.

Maintaining the natural character of the coast was regarded as an important issue by Parliament during the Resource Management Law reform process. The Governments of the time recognised the **need for strong national policy** on the subject, as eventually reflected in the Resource Management Act 1991.

Key concepts and intentions of the 1970s to 1991 Law Reform

The term ‘natural character’ was **not confined to unmodified** or predominantly natural environments.

(Ministry of Works and Development report 1972)

Protecting the natural **scenic qualities** of the coast was the fundamental concept underlying the phrase in the early 1970s, rather than the ecological concepts that emerged later.

(Central government reports prior to 1973)

By the late 1980s, **ecological values** emerged as fundamental to natural character, in addition to the earlier emphasis on scenic quality.

(Submissions and background papers on resource management law review)

The first draft of the Resource Management Bill separated **natural components** from **cultural components** of New Zealand’s overall ‘character,’ a distinction that was later blurred.

“The maintenance of the natural character of the coastal environment” was repeated in both Section 5 (1) and Section (2) of the Bill, reflecting Parliament’s intent to emphasise it as the **principal objective in coastal management**.

The word “maintenance” was replaced by the stronger word **“preservation”** in the second reading of the Bill and was retained, reflecting how seriously the issue of coastal management was taken at the time.

Whether or not the expression “recognise and provide for” imposed too strong an obligation was debated but Parliament supported the strong, though not absolute, duty implied.

In recognition of existing case law, a last minute change was made to section 5 (a) changing *“protection ...from unnecessary subdivision, use, and development” to “protection ...from inappropriate subdivision, use, and development.”*

2 The New Zealand Coastal Policy Statement

2.1 Introduction

A brief analysis of 'natural character' as featured in the New Zealand Coastal Policy Statement (NZCPS) is useful background to seeking a definition of 'natural character' in terms of Section 6(a) of the Resource Management Act 1991. It is important to note that Section 6(a) and the NZCPS represent different requirements under the RMA. Generally, these requirements are consistent. The NZCPS interprets or applies Section 6(a) in more detailed policy. However, the requirement in Section 6(a) will have priority over the NZCPS if any differences arise (Bielby 1997).

The draft NZCPS documents sparked much debate about the interpretation of the term "natural character". The interpretation incorporated a cultural element, which was deemed inconsistent with case law manifested under the Town and Country Planning Act. In this chapter, the definition of natural character in the NZCPS documents is discussed, and some recent Planning Tribunal/Environment Court decisions which hold specific relevance to the policies contained in the operative NZCPS are summarised.

2.2 Evolution of the NZCPS

The NZCPS has been subject to significant changes since the first draft was prepared in August 1990. Some of these changes paralleled those occurring during the resource management law reform process, and subsequent amendments to the Resource Management Bill.

The overall **purpose** of the draft NZCPS (August 1990) reflected clause 46 of the Resource Management Bill, which stated:

> *"The purpose of the national coastal policy statement is to state policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand as a whole and* ***to achieve the maintenance of the natural character of that environment, without precluding appropriate use and development".***

The overall purpose of the draft NZCPS changed markedly from "maintaining the natural character of the coast" as introduced in 1990 through to achieving the "sustainable management of natural and physical resources" as explicit in the operative NZCPS. The use of the word "maintaining" also reflects the 'natural character' clause contained in Section 5(1)(e) and 5(2) the Resource Management Bill introduced in 1990.

The 1990 draft also endeavoured to define the term "natural character". The definition is listed below:

> *"The qualities of the coastal environment which in their aggregate give the coast of New Zealand its recognisable character. These qualities may be ecological, physical, cultural or aesthetic in nature".*

In 1992 the second draft NZCPS was released for public comment. The 1992 draft contained seven "principles" material to achieving the sustainable management of New

Zealand's coastal environment. The principles were largely based on the Resource Management Act's Purpose (Section 5), and were to guide the intent of the New Zealand Coastal Policy Statement. The 1992 draft contained a glossary, which provided interpretations of the words "natural character", "coastal environment", "protection", and "preservation". The definition of natural character differed slightly to that contained in the 1990 draft whereby it was extended to include both "modified and managed environs".

Natural Character

> *"The qualities of the coastal environment that together give the coast of New Zealand recognisable character. These qualities may be ecological, physical, spiritual, cultural or aesthetic in nature. They may include modified and managed environs."*

The definition of the term "natural character" contained in the draft NZCPS was the subject of considerable scrutiny in public submissions and the views expressed by staff within the Department of Conservation. A large proportion of the submissions listed below disagreed with the inclusion of cultural and spiritual values in the overall definition. Concern was also expressed that the inclusion of modified and managed environments in the definition was attempting to preserve "man-made" or built structures.

2.3 Submissions on Draft NZCPS Relating to the Definition of Natural Character

All of the submissions referring to the interpretation of natural character are quoted here to provide an objective representation of public response on the issue.

Submission No. 303: Auckland City Council Community Board

"Rephrase to read '..give the coast its recognisable New Zealand character'."

Submission No. 376: Auckland Regional Council

"The usual definition of "natural" means existing in, or formed by nature, however the definition of natural character in the NZCPS has been defined as including "physical, spiritual, cultural and aesthetic values" and includes "modified and managed environs" (p.53.)

While the intent of this wider definition is generally supported, the question of the definition of "natural" arises. It is the Council's view that "natural" and "cultural" are not the same, and this should be reflected in the definition.

Much of New Zealand's landscape is modified from that which originally existed, and this general definition includes urban and developed areas of the coast. It is impractical to attempt to preserve, as part of the definition of natural character, "built", man-made and managed environs. Recognition needs to be given to the distinct character of the urbanised or developed coastline, and for the preservation of natural character within this context".

Submission No. 378: BHP New Zealand Steel

"However, there is reference in these other priorities to such subjective measures as "natural character", and "visually significant". Whilst some effort has been made to define 'natural character' it remains subjective. There will be many independent views on what the natural character is, what is visually significant and what may be worthy of protection. As such measures are likely to vary from area to area, it will no doubt

devolve to local authorities to establish Coastal Resource Inventories, or to include specifics in their plans and rules".

Submission No. 405: Marlborough and Nelson Conservation Board

"This should be limited to "those things which in the aggregate gave the coast of New Zealand its original and recognisable character". This policy should not attempt to define terms using values. This definition of Natural Character includes modified and managed environs. It is not clear what the Act intended natural character to include. No definition is needed as it is not in the Act."

Submission No. 587: Masterton District Council

"The definition of "natural character" does not reflect case law. The words "They include modified and managed environs" is not essentially "natural". This could mean that a port is of "natural character".

Submission No. 519: New Zealand Conservation Authority

"The definition of 'natural character' includes features which are not "of nature" or "indigenous and naturally occurring".

The definition should exclude those features and focus on features which occur naturally without the influence of people now or in the past".

Submission No. 94: University of Waikato - Terry Healy

"In the context of the Coastal Policy Statement the term natural character requires much better definition. Clearly it is not appropriate to view 'natural character' in the narrow context of "pre-European, pristine" environment. Such a definition could only apply to very small sectors of the modern New Zealand coast such as parts of Fiordland.

Rather we submit that the 'natural character' should be defined to include the features of the physical environment such as landform and vegetation, but excluding the obvious artefacts of human settlement (eg. houses, constructions, roads, etc). Thus the natural character would include pastoral and agricultural vegetation or exotic forestry, but would exclude human made structures."

Submission No.1035: NZ Institute of Landscape Architects

"Additionally, the definition in the Glossary in inadequate. Natural character is more than "recognisable character".

In the use of the term "character" there is automatically a cultural component to the interpretation as it involves perceptions and identifications of values/qualities by people. (Note that the cultural component may involve more than one culture). In Section 6(a) character is however qualified by "natural" which is what needs to be made more explicit in the CPS. The Concise Oxford Dictionary definition of "natural" is "established by nature". Thus natural character obviously includes the indigenous and/or the unmodified; it also includes a coastline which has been culturally modified but still has degrees of the natural. A highly modified or culturally altered coastline in virtually all instances in New Zealand will still have attributes which can be identified as contributing to the coastal environment's natural character".

Submission No. 33: Porirua City Council

"The definition of 'natural character' in the Statement (given in the Appendix) is interesting because it does not reflect case law on this matter, and is so broad as to be meaningless.."

"This would mean that the Port of Wellington would have a natural character to preserve this as a "modified or managed" environment. The use of case law would have provided a better definition in view of the Porirua City Council; for example grazed or farmed land along the coast has been determined to have an essentially natural character, whereas a largely built-up area does not (Combined Estuary Assn vs. Christchurch City, (1988) 13 NZTPA 438). In other words, the prevailing element must be essentially natural".

2.4 The Natural Character Definition – Debate Within DoC

The definition of the term 'natural character' contained in the draft NZCPS was not reflective of the large body of case law that had evolved under the Town and Country Planning Act. This deviation from past judicial interpretation may be partially explained by the excerpt listed below:

> *"...the definition of "natural character" within the NZCPS recognises the expanded context within which such terms will be defined in future and accordingly extends the existing case-law derived definition". (Rennie 1993).*

The reason for the inclusion of cultural and metaphysical components in the definition of natural character related largely to the incorporation of Maori values and interests. In drafting the NZCPS it was considered necessary to take into account both the Treaty of Waitangi as required by Section 8 of the RMA and the broad definition of "environment". The definition of natural character therefore explicitly reflected a tangata whenua perspective of "natural". Accordingly, the metaphysical concepts of "mauri" were added to the definition (Rennie 1993).

However, this approach to defining natural character was criticised by staff within the Department. It was argued by Smale (1993) that to make sense of the natural character issue, the metaphysics are better left out and a pragmatic approach taken to identifying what are the natural, as opposed to the cultural, patterns and processes. He further argued that the protection of characteristics of the coastal environment of special value to the tangata whenua are taken into account within Section 6(e).

The definition of natural character was also criticised from other perspectives. One such criticism related to the lack of emphasis placed on the word "natural". Anstey (1993), in reference to the glossary definition remarked:

> *"This is about coastal character, not natural character. Under a definition which embraces 'modified and managed' the indigenous may cease to be recognisable and therefore the coastline no longer distinctively a NZ one. The glossary definition is about "Coastal Character" and not "Natural Character". A qualifier would have to say "an excessively modified coast may cease to express its former natural character and therefore its NZ distinctiveness".*

Another criticism held by Anstey (1993) was that the definition could be read to imply that a cultural dimension can always be accommodated without "natural character" being compromised. Moreover, Anstey (1993) commented:

> *"The definition is all so inclusive that development could have quite profound effects and still protect and sustain "natural character". In making judgement about whether a development should be allowed, resort would have to be made to subjective matters such as the appropriate balance of the attributes identified in the definition; aesthetics, taste, etc. Over time the "natural character" of a particular place would likely to become increasingly cultural and decreasingly indigenous. In this scenario we are back in the Town and Country Planning Act. We are simply*

making judgements about cultural preferences and, as under the old Town and Country Planning Act, focusing debate on conflicting uses rather than on the real conflict the RMA would have us address: the conflict between cultural uses and environmental effects".

It is further commented by Anstey (1993) that, for the natural character definition to be useful, it must clearly identify the criteria against which the effects of culturally induced change are to be judged. This, according to Anstey (1993) is what makes New Zealand distinctive, and the attributes of that distinctiveness, once gone, cannot be replaced.

2.5 Board of Inquiry Comments on Draft NZCPS

The Board of Inquiry made specific reference to the definition of the terms "coastal environment" and "natural character". It was held by the Board that a definition of these terms (or any other terms defined in the glossary but not defined in the Act) was inappropriate for inclusion in the NZCPS. This view pointed to the fact that the NZCPS would be binding on the Planning Tribunal or higher courts. It was, however, considered necessary for the Board's interpretation of these words, to be conveyed to those who were to apply the NZCPS in due course.

The definition of "natural character" presented by the Board refers to the word 'character' as the *"qualities, nature, features of somebody or something", and 'natural' as something* that is *"created by nature, as distinct from that which is constructed by man".* (Physical Environment Assn vs. Thames Coromandel District Council (1982). The Board further states:

"to be a matter of national importance, the Act is calling for the preservation of those qualities and features in coastal environments which have been brought into being by nature i.e. the preservation of coastal environments in their natural state".

It is important to note that the Board of Inquiry's views on the term "natural character" and "coastal environment" are not definitive and that neither term is defined in the RMA. The Board of Inquiry's definition of the term 'coastal environment' is outlined in more detail in Chapter 3 with a judicial interpretation of these terms.

2.6 New Zealand Coastal Policy Statement 1994

Subject to the recommendations of the Board of Inquiry, public submissions, and consensus from the Department of Conservation, all of the glossary definitions contained in the draft were deleted. The New Zealand Coastal Policy Statement became operative in May 1994. The overall purpose of the NZCPS is to achieve the purpose of the Act in relation to the coastal environment of New Zealand. In addition to this, the NZCPS contains 14 general principles to which "regard" must be given. These principles provide for the "special context" of the coastal environment".

For structural simplicity and to be in keeping with s.58(e) of the Resource Management Act, the NZCPS policies address all the matters contained in Section 6 of the RMA. Some policies are not solely related to natural character (e.g. historic places), but are intended to recognise the role that natural character may have in retaining the special character of such places (Rennie 1993).

The policies contained in Chapter 1 of the NZCPS, which are primarily directed towards preserving the natural character of the coastal environment, are briefly discussed below along with relevant case law.

2.7 Case Law Decisions Involving NZCPS Policies

2.7.1 Policy 1.1.1

In the NZCPS (1994), Policy 1.1.1 states:

> *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.

Nugent & Solomon (1994) state that the purpose of this policy is to express the ways in which natural character of the coastal environment can be preserved by **avoiding, remedying or mitigating** the effects of activities on the environment. It requires taking into account the **potential** effects of subdivision, use, and development on the values relating to the natural character of the coastal environment.

- **Sporadic Subdivision, Use and Development**

The case *Reynolds DM & SL vs. Kaipara District Council, Northland Regional Council (1996) A031/96* holds specific relevance in respect to Policy 1.1.1(a) which encourages development in areas where the natural character has already been compromised, thus avoiding sporadic subdivision. The appeal was against the Council(s) for granting resource consent for a new camping ground on rural land at Matakohe, a minor headland in the upper reaches of the Kaipara Harbour. The site is in pasture and contains some derelict farming structures.

The appellant's planning consultant argued that the proposal represented sporadic subdivision and use, and was contrary to Policy 1.1.1(a) of the New Zealand Coastal Policy Statement. The Environment Court found that in the context of Matakohe (a scattered settlement), a camping ground located some 400m from the centre of the town was not found to be 'sporadic development'. The decision granting the consents was confirmed and costs were awarded against Reynolds. The Environment Court ruled:

> *"We consider that whether development is sporadic depends on the **context**. In a context of close settlement, a camping ground with traveller's accommodation located some 400m from the centre of the settlement might well be considered sporadic development. However, in the context of a scattered settlement such as Matakohe we find that it is not".*

The Environment Court decision *Brook Weatherwell-Johnson and Others vs. Tasman District Council (1996) W181/96* also referred to the issue of sporadic development in terms of Policy 1.1.1(a). The case involved an appeal by local residents against a proposed Plan change which sought to re-zone 123 ha of land at Motupipi Hill. The re-zoning would have facilitated the establishment of a residential "village" as well as recreation areas.

Motupipi Hill is situated near Takaka township, and is bounded by the Motupipi Estuary and Motupipi River. Motupipi hill is characterised by a dissected isolated hill. Vegetation within the site consists of dense scrub, regenerating native bush, and some scattered self-sown pines. At the outcome, the Plan change was declined, and the appeal allowed. Taking into account the issue of sporadic development in terms of the NZCPS, the Environment Court (in referring to the proposal) ruled:

> *"It obviously constitutes sporadic subdivision in that it is not the extension or development of an existing settlement - providing as it does a fresh and isolated development node - whether or not it is planned. It has "leap frogged" the intervening coastal environment between the other surrounding coastal settlements to settle on the site, becoming as Mr Nugent put it "almost like a new town creation".*

- **Cumulative Effects**

Cumulative effects are one element in the definition of "effect" outlined in Section 3 of the RMA. The policies of the NZCPS give particular emphasis to cumulative effects as opposed to other types of effects covered by Section 3 (i.e. actual or potential effects).

The case *Greensill AEN & Ors vs. Waikato Regional Council (1995) W017/95* is of specific relevance to Policy 1.1.1(c), "the avoidance of cumulative effects in the coastal environment". The case involved an appeal against the granting of resource consents to allow a 3.2 ha Pacific Oyster farm situated in Paritata Bay, Raglan Harbour. The Raglan and Manukau harbours are the only two on the west coast of the North Island that remain free of marine farming. The land surrounding the bay is predominantly pastured. Despite its modification from its original form, the land is devoid of dominant or obtrusive structures.

The Tribunal held that the remaining natural character of the environment in question did not warrant protection as a matter of national importance under Section 6(a). However the Tribunal did consider that its situation was one in which environmental **effects** had to be recognised. The proposed oyster farm constituted another **cumulative effect** that had to be weighed against the economic benefit to the applicant. The appeals were allowed.

The Tribunal in the case *Nelson Fisheries Ltd vs. Marlborough District Council (1995) W98/95* held that grouping the marine farms within a specific area would be avoiding cumulative effects in the coastal environment. The appeal was against the granting of consent by the Council for a coastal permit to establish a 6 ha marine farm at the northern end of Deep Bight. The Council granted only 50% of the area applied for. The land surrounding the bay had been modified from its native bush state to pine plantations. Although the immediate area is largely unmodified, the Tribunal considered that the marine farm would have minor impact on the natural character, given the vast area of water contained in the bay. The appeal was disallowed.

The Tribunal referred specifically to cumulative effects contained in Policy 1.1.1(c) of the New Zealand Coastal Policy Statement in stating:

> *"In assessing these provisions, we consider the natural character of the area is already compromised. In terms of cumulative effects, there are some situations where it is more beneficial to have a grouping of marine farm structures than have them dotted indiscriminately over the whole of Port Underwood".*

Another more recent case, *Director General of Conservation vs. the Marlborough District Council and Marlborough Mussel Company Limited (1997) W89/97* involved an appeal against the establishment of two marine farms in Tawhitinui Bay in the Marlborough Sounds. The Tribunal acknowledged that considering cumulative effects was important because it is included in the definition of effects in s.3 of the RMA, and in Policy 1.1.1(c) of the NZCPS. The Tribunal ruled:

"When considered in the light of the existing farms, the addition of two farms will have some significant adverse effects on the coastal environment because it will reduce access to the foreshore of the bay from the water (which is the main access point), and it will complete a visual line of farms stretching around it. By contrast, the addition of the reduced size northern site will leave open the access area, and the visual line will not extend around the full bay. But overall, we have concluded even the addition of the reduced area would be adverse in its accumulation because surrounding areas are already so compromised and because the head of the bay has a high natural character".

The appeal was allowed and the council's decision to grant the mussel farm cancelled.

2.7.2 Policies 1.1.2 - 1.1.4 (See Appendix 1)

Policy 1.1.2

The fundamental purpose of Policy 1.1.2 is to link the provisions outlined in Section 6(a) with the protection of areas of significant indigenous vegetation and significant habitats of indigenous flora contained in Section 6(c). Outlined below is a summary extracted from Nugent & Solomons' 1994 analysis of the relative importance to be placed on the habitats contained in Policy 1.1.2.

*1.1.2 (a) The habitat areas defined are afforded the greatest priority in that the actual and potential effects must be **avoided**. This clause relates to species which, in a **national context**, are vulnerable or more threatened.*

*1.1.2 (b) The habitats outlined in (b) are afforded a lesser priority in that effects shall be **remedied**. This clause relates to species which, in a **national context, are rare** or, in a **regional context, are rare or more threatened.***

1.1.2 (c) This clause involves the protection of ecosystems unique to the coastal environment.

1.1.2 (d) This clause sets as the lowest priority, the protection of areas of significant indigenous vegetation or habitats of indigenous fauna, but seeks to maintain their integrity and contribution to the natural character of the coastal environment by minimising the effects of activities.

The remaining policies seek to identify features of particular importance to preserving the natural character of the coastal environment. In respect to case law decisions on these policies the recent case *Trio Holdings vs. Marlborough District Council W103A/96* holds particular relevance to the interpretation of policy 1.1.3 and 1.1.4. The Tribunal held:

"As to policies 1.1.3 and 1.1.4 and the national priority to protect the collective characteristics which give the coastal environment its natural character including scenic areas and the biotic components of that character, we consider that without the mitigation proposed the proposal is likely to offend both policies. We also consider that in respect of these biotic patterns we should take a precautionary approach in respect of the adverse effects from the mussel farms. We consider we have a duty to keep the area in as natural a condition as possible".

2.8 Conclusion

This chapter has focused on the interpretation of 'natural character' in terms of the draft and operative New Zealand Coastal Policy Statements. A brief summary of case law relating to the relevant 'natural character' policies has also been provided.

The terms 'natural character' and 'coastal environment' were defined in the glossary of the draft New Zealand Coastal Policy Statements, (1990 and 1992). However, the inclusion of cultural components in the 'natural character' definition was contested through public submissions and by staff within the Department of Conservation. Subsequently, the Board of Inquiry recommended that all of the glossary definitions contained in the draft be deleted. Moreover, the Board recommended that the term 'natural character' encompass those qualities and features that have been brought into being by nature as opposed to human constructions. This interpretation was based upon case law decisions heard under the Town and Country Planning Act.

2.9 Chapter Summary

Definitions of Natural Character in the Draft NZCPS

An **early definition** of the term natural character was attempted in the 1990 draft:

> *"The qualities of the coastal environment which in their aggregate give the coast of New Zealand its recognisable character. These qualities may be ecological, physical, cultural or aesthetic in nature."*

The **cultural element** in this definition was intended to incorporate Maori values, taking into account the Treaty of Waitangi and a tangata whenua perspective on "natural."

Submitters recommended that natural character should:

- be applicable to **both unmodified and modified environments**
- be confined to things **"established or created by nature"** - physical features of the environment such as landform and vegetation
- **exclude human-made** built elements such as structures and roads.

The Board of Enquiry **deemed that a definition was inappropriate in the NZCPS**, but stated that natural character was that which is "created by nature, as distinct from that which is constructed by man."

Case Law Relating to NZCPS Policies

Policy 1.1.1 (a) Sporadic subdivision, use or development

Subdivision would not be sporadic if it were an extension or development of an existing settlement, but would be if it were clearly a separate development node.

(Brook Weatherwell-Johnson and Others vs. Tasman District Council)

The context of existing settlement pattern must be considered when deciding whether a development is sporadic or not.

(Reynolds vs. Kaipara District Council)

Policy 1.1.1 (c) Cumulative effects

In modified environments cumulative effects are an important consideration.

Preservation of the remaining natural character may preclude further development.
(Greensill and Ors vs. Waikato Regional Council and Director General of Conservation vs. Marlborough District Council and Marlborough Mussel Company Limited)

The cumulative effect of grouping uses in one area may have less adverse effect than having the use occurring at a range of sites over a large area.
(Trio Holdings vs. Marlborough District Council)

An **early definition** of the term natural character was attempted in the 1990 draft:

> *"The qualities of the coastal environment which in their aggregate give the coast of New Zealand its recognisable character. These qualities may be ecological, physical, cultural or aesthetic in nature."*

The **cultural element** in this definition was intended to incorporate Maori values, taking into account the Treaty of Waitangi and a tangata whenua perspective on "natural."

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- **exclude human-made** built elements such as structures and roads
- the Board of Enquiry deemed that **a definition was inappropriate in the NZCPS**, but stated that natural character was that which is "created by nature, as distinct from that which is constructed by man."

Policy 1.1.2 - Significant indigenous vegetation and habitats

The policy is intended to link the provisions of RMA Sections 6(a) and (c), and provides a hierarchy of relative importance for types of habitat.
(Nugent and Solomon)

Policies 1.1.3 and 1.1.4 - Features of natural character

The Planning Tribunal summarised policies 1.1.3 and 1.1.4 as "the national priority to protect the collective characteristics which give the coastal environment its natural character."
(Trio Holdings vs. Marlborough District Council)

The Tribunal stated, "We consider we have a **duty** to keep the area in as natural a condition as possible." This ties in with debate on the obligation inferred by RMA section 6 phrase "to recognise and provide for."
(Trio Holdings vs. Marlborough District Council)

3 Legal Interpretation of Natural Character

under the Town and Country Planning Act(s) and the Resource Management Act (1991)

3.1 Introduction

This chapter provides an analysis of case law relating to the natural character clause under both the Town and Country Planning Act, and the Resource Management Act (RMA 1991).

The RMA has, to a large extent, altered the context in which the natural character clause operates. The purpose of the Act is to achieve sustainable management, and Section 6(a) is one of the many 'means' to achieve that overall goal. However, as discussed in Chapter 1, it was Parliament's intent to keep the wording of Section 6(a) as close as possible to Section 3(1)(c) (TCPA) in order to utilise the large body of case law which had developed since 1973. The fundamental change from Section 3(1)(c) to Section 6(a) is the replacement of the word "unnecessary" with "inappropriate". For the practical application of this report, the legal interpretation of "unnecessary" is considered immaterial and is therefore not included.

The role of Section 6(a) in achieving the overall Purpose of the Act is evaluated and the application of the two separate tests contained in Section 6(a) discussed. Key words present in both Sections 6(a) and 3(1)(c) are evaluated throughout the chapter to highlight the significance of new, critical definitions introduced under the RMA. Definitions of "environment", "natural and physical resources", and "intrinsic values" can be seen to expand the way in which case law will continue to develop without throwing out that which has already evolved (Rennie 1993, Park 1996).

Finally, the level of preservation or protection that is provided for, particularly in assessing development proposals, is a key issue arising from the interpretation and application of Section 6(a).

3.2 Context in Part II of the RMA

3.2.1 Achieving the Purpose of The Act

Fundamental to Section 6(a) and the other principles listed under Part II is the principle of achieving the sustainable management of natural and physical resources (Section 5). The wording of Section 6 begins in stating:

> *"6. Matters of National Importance - **In achieving the purpose of this Act**, all persons exercising functions and powers under it...."*.

This differs from s.3 matters in the Town and Country Planning Act, which were considered as "matters of national importance" in their own right and not subject to any overall purpose of the Act.

The case *Minister of Conservation vs. Kapiti Coast District Council (1994) NZRMA 385*, involving a proposal for a rural lifestyle subdivision situated on the Kapiti Coast demonstrates the role of Section 6(a) in achieving the overall Purpose of the Act. Judge Sheppard in his decision raised the point that

> *"given the duty imposed by s.6(a) in promoting the statutory purpose of sustainable management as stated by s.5, consenting to the proposed subdivision, and the implied use and development that would follow, would not promote sustaining the potential of the natural resources of the land to meet the needs of future generations". Moreover, in his reference to the subdivision, he stated:*
>
> *"It is 'inappropriate' from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is* ***sustainable management*** *and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision".*

3.2.1.1 Section 6.(a) Is not an end in itself

In examining the role of Section 6(a) in achieving the purpose of the Act, the High Court case *New Zealand Rail Ltd vs. Marlborough District Council AP 169/93* provides an example where the preservation of the natural character of the coastline was compromised for economic reasons which were to be of nation-wide benefit, and which promoted sustainable management. The case involved an appeal by New Zealand Rail (the appellant) and a cross appeal by Port Marlborough New Zealand Ltd (the second respondent) against a decision by the Planning Tribunal on the second respondent's proposal to construct a port facility in Shakespeare Bay, Picton. The Bay at the time of the appeal was largely unmodified, apart from a derelict freezing works. The following statement was made by Judge Skelton at the Tribunal hearing and upheld by Justice Greig in the High Court:

> *"The recognition and provision for the preservation of the natural character of the coastal environment in the words of s.6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources.* ***That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose."***
>
> ***"It is not protection of the things in themselves but insofar as they have a natural character. The importance of preserving and protecting is to achieve and*** **promote sustainable management."**

The practical application of sustainable management by the Tribunal in the *Port Marlborough* case can be viewed in terms of the following interpretation as quoted by Judge Skelton:

> *"The term sustainable management includes development to provide for a community's economic well-being if adverse effects can be avoided, remedied or mitigated and the foreseeable needs of future generations taken into account."*

The case Trio Holdings and Treble Tree vs. Marlborough District Council (1996) W103A/96 is a recent example where the preservation of natural character was sought only in terms of sustainable management. The case involved an appeal brought against the Council for refusing three coastal permits to establish a 9 ha marine farm at Waitata Beach in the Marlborough Sounds. The main purpose of the application was to permit the cultivation of sponges as a source of anti-tumour treatment in humans, with the potential for considerable medical benefit nationally and internationally. It was

proposed that mussels be grown for the first five years only to provide cash whilst trialing the other sponge species.

Immediately adjacent to the proposed site were two privately owned lots, which were relatively steep with predominantly regenerating native bush cover. The bush contributed to the high degree of natural character in the area. Recently, the Department of Conservation had approved an 'eco camping ground' on the adjacent land. The land further north of the site near Waitata Bay was used for farming, forestry, and low-density residential development.

The Tribunal approved the establishment of the sponge farm, and declined the mussel farming in the context of promoting sustainable management. Moreover, Judge Kenderdine in taking into account the New Zealand Rail decision held:

> *"We therefore find it necessary first of all to assess the matters in s.5 as it is this Section which defines what is required in sustainable management before we return to the issue of the national importance of the protection of the coastal environment".*
>
> *"We have difficulty in accepting that the visual impairment from the buoy of the sponge farm on a temporary basis of a regional area of natural character, should prevail over an issue of the national health and welfare which stems from the implications of this proposal".*
>
> *"We concluded on these appeals that those in opposition to the proposal are seeking to make the same mistake as did the appellants New Zealand Rail. The natural character of the coastal environment of the Marlborough Sound is not to be protected at all costs - but to be protected in terms of sustainable management".*

Judge Kenderdine outlined the Environment Court's practical application of sustainable management in relation to the *Trio Holdings* case as follows:

> *"We consider that the definition of the sustainable management under s.5(2) for the purposes of these appeals requires managing the use and development of the coastal marine area and the protection of the area's natural resources in a way which enables the people of New Zealand and including the communities of the Marlborough District to provide for their social and economic well-being, and their health and safety whilst achieving the caveats in s.5 (2)(a)(b) and (c)".*

3.2.1.2 Supporting Part II matters

It should be noted at this stage that Part II matters may work in unison in strengthening a case in support or against a particular proposal. The case *Harrison vs. Tasman District Council W42/93* provides a good example where all the Part II matters militated against the siting of a refuse transfer station at an existing rubbish dump near the Motupipi estuary. The Tribunal held:

> *"When considering s.5 in conjunction with s.6 we also have the question of preservation of the natural character of the coastal environment and rivers and their margins which we have already addressed. Combined with that in terms of s.6 is the protection of outstanding natural features and significant habitats of indigenous fauna".*
>
> *All of the elements of Part II of the Act to which we have referred militate against siting this particular facility, which has every potential for environmental offence if poorly managed, within an environment which the Resource Management Act seeks to protect".*

3.2.1.3 Section 7

Although Section 6(a) is subservient to Section 5 of the Act, matters of national importance are to be given greater weight than the "other matters" set out in s.7. However, as we have seen from the *Harrison* case, certain Section 7 matters (i.e. intrinsic values of ecosystems) have been vital in strengthening cases that seek to preserve the natural character of the coast.

One of the first occasions that the Tribunal considered the meaning of such matters in detail was the case *Gill vs. Rotorua District Council and Schwanner (1993)*.

The *Gill* case concerned an appeal against a resource consent to develop 11 residential dwellings adjacent to a Maori Reserve on the Tarawera lakefront. The site of the proposed activity had been designated a Proposed Scenic Reserve with residential development being a non-complying activity in the Rotorua District Plan. The council approved the resource consent application. Subsequently, the Tribunal overturned the decision on the grounds that the Council failed to consider Maori issues (namely s.6(e), s.7(e) and s.(8); and historical and ecological factors. Furthermore, the Tribunal held that the Council had failed to recognise and provide for the preservation of the natural character and the protection of landscape values.

Concerning the relationship of Sections 6, 7, and 8, in Part II of the Act, the Tribunal in its decision stated:

> *"The Council's actions appear to have been merely passive. The test which the Council has to meet under all provisions of s.7 is a high one. The Section imposes a duty to be on enquiry."*

The *Gill* case was particularly significant for consent authorities considering matters under the Act. It was explicit that the s.7 test holds notable importance when evaluating resource consent applications. Phillipson (1994) states that the only logical conclusion that can be drawn from the Tribunal's dicta is that the standard of duty imposed by s.6 is even higher than s.7.

3.2.2 Matters of National Importance

3.2.2.1 Status under the 1953 and 1977 Town and Country Planning Acts

Until 1977, the matters of national importance (including paragraph (c) enacted in 1973) were given no priority as a matter of weight over the general purposes of a district planning scheme (Ministry of Works and Development vs. Waimea West County Council 1979 NZLR 379). However, under the 1977 Act, matters of national importance were given priority over the more general purposes of planning in the absence of factors justifying a contrary decision. It seemed clear to many practitioners that the 1977 Act positively changed the status of matters of national importance.

The 1977 Town and Country Planning Act expanded the matters of national importance to form a clear set of principles, which were to be taken into account at both regional and district levels. Several Sections of the Act referred back to Section 3 and were expressly made subject to it. It seemed that Section 3 was intended to be paramount.

However, a significant case heard before the Tribunal in 1979 saw Section 3 interpreted as read in the **context of the whole Act**, in much the same manner as Section 2B of the 1953 Act *(Pikarere Farm Ltd vs. Porirua City Council (1979))*. The application was for consent to discharge waste into the waters of Cook Strait. The appellant sought to introduce almost all matters listed as nationally important in Section 3, in particular paragraphs (c) and (d). In examining s.3(1)(c), it was held by Judge Treadwell that the coastal environment did not include the bed of the sea, the sea itself

or the surface of the sea. The Tribunal was concerned only with the appearance of the proposed treatment plant, not the outfall pipe or discharge from it.

The case, *Smith vs. Waimate West County Council (1980) NZTPA 241*, which appeared a few months later resulted in a landmark decision that was to govern town planning matters for the next nine years. The case involved the Council changing the district scheme at the request of the Natural Gas Corporation for the purpose of permitting an ammonia-urea fertiliser complex. The Tribunal decided that the construction of the plant was a matter of national importance because it would inject capital into the area, create jobs and contribute to ongoing development in the region. This analysis confused the matters in Section 3 with those in Section 4. Furthermore regional benefits were not intended to be covered by Section 3. The high potential of the land for food production was a matter of national importance but lost out to those matters that the Tribunal had described as being within s.3(1)(a). The most compelling and influential statement held by the Tribunal was as follows:

> *"The change in the wording by making certain Sections subject to s.3 does no more than to make explicit what was implicit, namely s.4 and 36 where they apply, are not exclusive Sections so that s.3 continues to be applicable as well".*

According to Caunter (1992) the Tribunal's statement relied to some extent on the *Waimea County* decision, which was correct under 2B of the 1953 Act, but not applicable under the 1977 Act. Consequently, the Tribunal's findings were an error of law. This was not corrected until the 1989 Court of Appeal decision *Environmental Defence Society vs. Mangonui County Council.*

3.2.2.2 Matters of national importance have primacy over district considerations

The following two cases, *Mangonui* and *Opoutere*, resulted in some landmark decisions relating to the status of "matters of national importance" and the treatment of the word "unnecessary" under the Town and Country Planning Act. These decisions are particularly important in respect to interpretation under the Resource Management Act for two reasons. First, both cases continue to have relevance in relation to Section 6(a)[11]. Secondly, as both cases were heard in the Court of Appeal, the decisions were important precedents.

Mangonui

The case *Environmental Defence Society Inc and Tai Tokerau District Maori Council vs. Mangonui County Council 13 1977 NZTPA* involved an application for a scheme change for the development of a new tourist resort on the remote Karikari Peninsula, located in the Bay of Islands. The peninsula is situated within a virtually unspoilt environment with a diverse array of coastal landscapes including bays, inlets, ocean beaches, shell banks, rocky headlands, and cliffs. The scheme was amended to allow the proposal, but the Environmental Defence Society (EDS), objected and appealed to both the Tribunal and High Court.

The appellants (EDS) argued to the High Court that the Tribunal had failed to give sufficient weight to matters listed in s.3(1)(c) when evaluating the zoning proposals in terms of Sections 3 and 4 of the 1977 Act, had not addressed whether or not the proposed development was necessary and had failed to consider the relationship of the local Maori people with their ancestral land. They further argued that under the 1977 Act, matters of national importance had been given more weight than they had previously under s.2B of the 1953 Act and that the Tribunal had erred, *"in allowing what were only possible and speculative social gains to prevail over the certainty of major social disruption of the small local community".* The Tribunal's decision, however, was backed by Mr Justice Chilwell. Following the dicta in *Waimate West*, he held that the proposal had correctly balanced size and impact against unemployment.

[11] Case law relating to the word "unnecessary" is no longer applicable under the RMA (1991).

Six months later, the appellants were heard in the Court of Appeal, where the Court overruled both the Tribunal and High Court judgement in a 3:2 decision. The Court found that the balancing exercise advocated in the *Waimea County* decision was no longer appropriate and that the matters set out in s.3 had a degree of primacy over other planning considerations.

Mr Justice Somers criticised the Tribunal for having excess regard to **local factors** such as high unemployment and underdevelopment when considering the case. More specifically, he held:

> *"Section 4 is expressly declared to be "subject to Section 3". As the district scheme must provide for the matters of national importance mentioned in Section 3 this can only mean that the purposes and objectives set out in Section 4, which have as their aim the benefit of the district, must give way to the stated national interests. In short the interests of the district are subordinate to the declared matters of national importance."*

Opoutere

The case *Opoutere Residents and Ratepayers Association vs. Thames Coromandel District Council 1985* also highlights the status of matters of national importance in respect to local and regional issues. The case involved an appeal against the Council for granting a consent for a camping ground on the applicant's land at Opoutere Beach, situated on the eastern side of the Coromandel Peninsula. Although previously used for informal camping, the land in question bordered a wildlife refuge at Wharekawa sand spit, an important habitat for several birds, including the threatened New Zealand dotterel. The village of Opoutere was described by the Tribunal as *"nestled sensitively into a natural bush and coastal environment"*, being one of only two major beaches in the Coromandel area that had no settlement directly behind it.

It was viewed by the Tribunal, in their decision to uphold the case, that the total number of people holidaying in the vicinity would be well within the capacity of the total Opoutere environment and the road serving the settlement. In passing this judgement they presented the following question: *"Should planning powers be used in a way which will restrict the number of people who may take holidays at Opoutere and enjoy the recreational experience available there?"* The Tribunal argued that the camping ground would not significantly damage the qualities that people sought there. It is interesting to note, however, that proposed improvements in the metal road were not apparent at the time of the application; and no evidence had been given of the proposed increase in holidaymakers. The case was appealed to the High Court on the grounds that the Tribunal had not adequately applied the test of necessity in Section 3. Mr Justice Tomkins dismissed the appeal, holding that the Tribunal had taken account of all matters it was required to consider.

Shortly after the landmark *Mangonui* case, the *Opoutere* case was heard in the Court of Appeal, and all three judges overruled the previous Court decisions. The *Mangonui* decision was very influential in the judgement of the *Opoutere* case, particularly in affirming that the Tribunal had failed to accord the requisite degree of primacy to the matters of national importance in s.3(1)(c). The principal judgement was delivered by Justice Somers, who made the following statement:

> ***"The matters of national importance set out in Section 3 have primacy over district considerations".***
>
> *"It seems clear that the Tribunal proceeded to balance the national considerations against other features which it considered material in the way suggested in Ministry of Works and Development vs. Waimea County (1970)".*

3.2.2.3 Conflicting matters of national importance

There is no guidance provided in the Resource Management Act as to the weight given to the different matters of national importance in the event of a conflict situation (Parliamentary Commissioner for the Environment 1996). The following cases heard under both the TCPA and the RMA have been summarised to provide examples of the weighting afforded to s.3(1)(c) and s6(a) in comparison to other listed matters of national importance.

The first case of this type to come before the Tribunal under the 1977 Act involved a Council wishing to designate an esplanade strip over sacred Maori land. (Knuckey vs. Taranaki County Council 1978). The conflict arose between the following issues: first, the enhancement of the physical environment (s.3(1)(a)), and secondly, the relationship of Maori and their ancestral land (s.3(1)(g)). The Tribunal argued that in a conflict situation, **a more specific objective may properly be given priority over a general objective.** In this case, the protection of Maori land took priority over the proposal to enhance the "physical environment" through public acquisition of ancestral land.

Another example of conflicting matters of national importance was illustrated in the Mangonui case. Such reference pointed to the Tribunals' support for the Karikari application by reference to Section 3(1)(b): the wise use and management of New Zealand's resources, along with the weighting of local benefits. The Court of Appeal stressed that this was not a case where paragraphs (b) and (c) of s.3 overlapped, and that the preservation of the coastal environment could not be weighed against the wise use of the nation's resources. Mr Justice Somers held:

> *"It will, no doubt, often be the case that there is some conflict between the matters of national importance listed in s.3. When that occurs it will be necessary to weigh the conflicting national interests and reach a conclusion as to where on balance the matter lies. A necessity which might otherwise be sufficient may have to succumb to other features in s.3 whose importance is, in the circumstances, of greater strength."*

Justice Cooke held:

> *"In given cases the particular matters of national importance listed as (a) to (g) of Section 3(1) may compete among themselves. There is no legislative direction about their weights inter se. It is for the planning authority or the Tribunal on appeal to undertake a balancing exercise on the facts of each particular case".*

A more recent decision heard under the RMA 1991, *Mataka Station Ltd vs. Trustees of Matoa Block* saw a conflict between matters of national importance in Section 6(a) and 6(e)[12]. The appeal was brought against a consent for a discretionary activity (subject to conditions) to allow a papakainga development on Maori freehold land in the Bay of Islands. The concerns raised in the appeal related to the location of 25 houses on the seaward face of a cliff. This was considered to detract from the natural character of the coastal environment. Although only an interim decision has been reached, the Tribunal found that on the basis of certain house re-sitings and a revised condition about planting, the development was appropriate. Judge Sheppard held:

> *"While mindful of the need to preserve the natural character of the coastal environment and protect it from inappropriate subdivision, use, and development, we have endeavoured at the same time to meet the concerns of the applicant - namely, that the intended occupants be able to locate as closely as possible to those areas with the respective blocks where their special links and interests are*

[12] Section 6(e): The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

derived - those special links and interests being based on ancestral connections and other strongly felt bases of association."

3.2.2.4 Section 6 does not exclusively define matters of national importance

An important point to note about "matters of national importance" is that they need not be defined in terms of Section 6 of the RMA. The Tribunal held in *Marlborough District Council vs. New Zealand Rail (1995) W040/95* - ("fast ferries" case) that the matters of national importance contained in Section 6 may have to give way to **other competing** matters of national importance. In this case it was the positive benefits of the inter-island ferry links which were considered of national importance and not contrary to Section 5.

The Tribunal held:

"The other sections in Part II can be set to one side by other factors of national importance".

3.2.2.5 Matters of national importance can be overridden

The High Court decision New Zealand Rail Ltd vs. Marlborough District Council AP 169/93 portrays clearly that matters of national importance can be overridden by developments considered "appropriate" at a **national level**. The proposed port facility at Shakespeare Bay was considered appropriate in that it was "**nationally** suitable and fitting". Justice Grieg held:

"..If a development was appropriate nationally, that is to say a suitable or fitting development at a national level, preservation of the natural character of the coastal environment may have to give way. In our judgement that is the case here, although as we have just said, in reality we do not think the natural character of the coastal environment at Shakespeare Bay will be severely affected".

The Tribunal in the recent case *Trio Holdings and Treble Tree vs. Marlborough District Council (1996)* also held that a proposed sponge farm in the Marlborough Sounds was of international and national importance, and therefore overruled Section 6(a). Judge Kenderdine held:

"If the mussel farm aspect is removed as we propose, the sponge culture therefore remains at only 5% of the issue and because of its national and *international* implications *we consider that it is appropriate on a* ***national scale*** *that the natural character of the area in question be modified in the way we have identified."*

3.2.2.6 S.104 Subject to Part II considerations

The relationship between Part II of the Act and "other matters to be considered by consent authorities when making decisions on applications for resource consents" (s.104) has been an issue of ongoing concern. The wording of Section 104 when originally enacted in 1991 did not accord Part II any special status in respect to resource consent decisions. Part II was merely one matter listed together with other considerations such as relevant rules, policies or objectives of plans or proposed plans. This ruling was particularly applicable in the case *Batchelor vs. Tauranga District Council (1992) 1 NZRMA 266* where the comments of the High Court were clear as to the weighting, if any to be accorded to Part II matters when considering them in the context of s.104. More specifically the Court ruled that:

"Although s.104(4) directs the consent authority to have regard to Part II, which includes s.5, it is but one in a list of such matters and is given no special prominence".

This decision was also adopted in the case *Kennet vs. Dunedin City Council (1992) NZRMA 22* where the Tribunal stated:

"The matters in Part II of the Act which are referred to in s.104(g) are not necessarily to be given the primacy that one might expect having regard to the way in which they are expressed in Part II."

A similar view was taken by the High Court in *New Zealand Rail vs. Marlborough District Council (1994)* with the Tribunal confirming, *"with respect, that view of the law now appears to be confirmed... the judgement of the Full Court of the High Court in Batchelor."*

Parliament, however, moved to accord Part II a greater status by amending s.104 in the 1993 Amendment Act. Part II was removed from the list of matters in s.104(1) to which consent authorities are to "have regard", and replaced with:

***"Subject to Part II**, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to:*

a) Any actual and potential effects on the environment of allowing that activity...".

This amended Section considerably changed the approach adopted by the Tribunal, thus effectively overturning the decision in *Batchelor* (Phillipson 1994).

A recent decision by the Planning Tribunal clearly confirmed the new powers of Part II under the 1993 Amendment. In the case *Minister of Conservation vs. Kapiti Coast District Council 1994* the decisive issue was whether, as a matter of principle, the land should be subdivided for lifestyle housing, an issue which turned largely on the application of s.6(a) and the relevant planning documents. In considering s.104, the Tribunal referred to the 1989 *Mangonui* case and noted that the words "subject to" indicated that the provisions referred to were to prevail in the event of conflict, and that Part II matters were to be given greater weight, or primacy, than other relevant considerations. The Tribunal further stated:

"It is possible that by prefacing Section 104(1) with the phrase "Subject to Part II", Parliament intended to convey, indirectly, that it was not only the process of having regard to various matters listed in that subsection, but also the weighting of them to make the discretionary judgement enabled by Section 105(1)(b) and (c), that was to be subject to Part II".

"We have concluded in this case, exercise of the discretionary judgement informed by the statutory purpose, and made in fulfilment of that duty, leads to preservation of the natural character of the coastal environment prevailing over the considerations indicating grant of consent for the proposed subdivision. Therefore it is unnecessary for us to consider the application to the case of the tests in Section 105(2)(b), and we can proceed directly to state our reasons for that conclusion."

The subdivision therefore was not deemed "appropriate", in terms of s.6(a) because of the disturbance to dunes, the introduction of 17 houses into a substantially unmodified area, the speculative nature of the subdivision, and conflict with policies and rules in the transitional plan.

Bielby (1994), however, suggests that changes in the 1993 Amendment in respect to Part II have not prevented the emergence of differing judicial approaches in recent Planning Tribunal decisions. The case *Reith vs. Ashburton District Council (1994)* was the first decision given by the Planning Tribunal after the amendment to Section 104. The appeal concerned a refusal to grant a consent to retail agricultural equipment on a South Canterbury farm adjacent to a local highway. The Tribunal noted that the amended version of s.104 required that *"the matters in Part II are now, so it seems, to be given a measure of primacy".*

However, it went on to consider carefully what measure of primacy that might be. The Tribunal argued that the original s.104 RMA had been held by the High Court to give no primacy to the matters in Part II, and concluded that the new s.104 accorded Part II only a *"conflict resolution"* role. The Tribunal went on to grant the appeal and concluded that Part II was not of particular significance as there was no conflict to be resolved.

The deliberate approaches adopted in both decisions suggest a clear judicial difference of opinion on the interpretation of s.104. However, we can see from the *Minister of Conservation* decision that the Tribunal's tentative views clearly suggested a greater role for Part II under s.104 than merely one of "conflict resolution".

The case *Royal Forest and Bird Society of NZ Inc vs. Manawatu Wanganui Regional Council A86/95* clearly emphasises the point that consent authorities, irrespective of their functions under s.30 and s.31, must have regard to all Part II matters. The Tribunal held:

> *"The scope of the permissible considerations in deciding resource consent applications is not limited by the consent authority's functions under s.30 or s.31 so as to preclude the statutory purpose, or to preclude influence by any other provisions of Part II that are material in the circumstances".*

Sections 30 and 31 are relevant to deciding which body should be the consent authority but it is s.104 that governs what is to be considered at the hearing.

3.3 Preservation of the Natural Character of the Coastal Environment

3.3.1 Preservation

Although the word "preservation" is not defined in either the RMA or the NZCPS, a definition was contained in the **draft** 1992 NZCPS. This definition and other definitions not defined in the Act were not included in the operative NZCPS as they would not be binding on the Planning Tribunal or higher courts. However, that definition, (repeated below), is useful because it is defined in the context of the RMA.

> *"Preservation is given meaning by its use in Sections 6 of and 58 of the Resource Management Act 1991. Preservation normally inhibits changes which would detract from the natural character of the coastal environment. This does not preclude use which has no adverse effects. Where the natural character of the coastal environment requires preservation, the avoidance of adverse effects becomes important."(Draft NZCPS 1992).*

3.3.1.1 Preservation a higher standard than protection

The Ministry for the Environment pointed out in their report to the Select Committee on Supplementary Order Paper 22, that **preservation is a stricter requirement than protection:**

> *"Preservation means no change, whereas protection involves a value judgement as to the degree of protection necessary and how it can be afforded."*

The application of Section 6(a) therefore requires two different considerations. Firstly, there is the preservation of the existing natural character as it stands at the time of the application; and secondly whether the development is appropriate. These two tests appear contradictory in nature, for it is not clear how one is to preserve the natural

character of the coastal environment while, at the same time, allowing appropriate development.

The case law to follow shows that the courts have not applied the strict application of the word “preservation”.

3.3.2 Natural

Whether the term ‘natural character’ includes purely natural components, or the inclusion of man-made structures such as rustic baches, wharves, jetties etc has been deliberated. It is reasonably clear from the analysis and summary of the case law that follows, that the term ‘natural character’ refers exclusively to those features derived only through nature, whether or not they are in an original pristine state, or are culturally influenced. This approach, according to Rennie (1993), is quite logical because it acknowledges that there are no pristine environments and that the lawmakers were trying to preserve a certain character while recognising human influence on environments.

Evolving case law also highlights the various attributes contributing to the term ‘natural character’ such as the underlying landforms of the coastal environment and underlying ecological processes.

3.3.2.1 Defining ‘Natural’

The case *Harrison vs. Tasman District Council W42/93*, was useful in highlighting the purely ‘natural’ components that contribute to the term ‘natural character’. The case concerned an appeal against the granting of consents to develop a refuse transfer station at the site of an existing rubbish dump near the Motupipi estuary. The appeals were allowed, as the refuse station was deemed inappropriate in a coastal environment and contrary to the provisions in s.6(a) of the RMA (1991). The important point that came out of the Tribunal’s decision was the treatment of the word ‘natural’ in the overall context of Section 6(a). More specifically, the Tribunal ruled:

> *“We found the estuary presents a largely natural character with few signs of structures or human habitation at present visible from the grassed reserve to the north of the tip site when looking both inland and towards the mouth of the estuary.* ***The word ‘natural’ does not necessarily equate with the word “pristine” except in so far as landscape in its pristine state is probably rarer and of more value than a landscape in a natural state.*** *The word* ***“natural”*** *is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife both wild and domestic and many other things of that ilk as* ***opposed to man-made structures, roads, machinery, etc.”***

In interpreting that decision two “degrees” of natural character in the coastal environment can be identified. First, the highest “value” accorded to natural character is that of “pristine” environments, such as undisturbed landforms, natural processes, and native and endemic fauna and flora. Second, natural character includes, in its rather broad interpretation, all other features produced by nature, whether it be exotic plants, farmland, or deer. The introduction of any “man-made” structures automatically detracts from the natural character present.

Three years after the influential *Harrison* decision, another case concerning Motupipi estuary reinforced the judicial interpretation of ‘natural character’ as being those elements derived solely through nature. The case *Brook Weatherwell-Johnson vs. Tasman District Council (1996) W181/96*, as discussed in 2.6, involved an appeal against a proposed Plan change, which would facilitate residential development at Motupipi Hill, Takaka. The site is characterised by a dissected isolated hill. The vegetation on the site is described by Ms Lucas (landscape architect for the appellants) as *“at the ‘gawky adolescent’ stage due in particular to perceptions of unmanaged*

pines, gorse and brackens as being 'useless' cover, unproductive for forestry, farming or nature." The appeal was allowed, and the proposed Plan change declined. In referring to the degree of natural character prevalent at Motupipi Hill, Judge Kenderdine held:

> *"We accept that Motupipi Hill itself is an area where the natural character has been compromised over the years by farming, mining, exotic planting and logging and it has bulldozed tracks. Mr Garland's evidence was that it had departed further from a pristine state than any other rural land in Golden Bay. Certainly this is borne out by many of the photographs put in evidence by the appellants or witnesses to some of the past activities and their effects upon the hill. But the word "natural" does not necessarily equate with the word "pristine" as was held by the Tribunal in Harrison vs. Tasman District Council (1994)".*

Natural character derived purely from natural components – other case law

The following decision, *Physical Environment Association of the Coromandel (Inc) vs. Thames Coromandel District Council (1982) 8 NZTPA 404*, confirms the statutory interpretation of 'natural character' as being derived purely from nature, with no added structural components.

The *Coromandel* case is particularly interesting because a 'design with nature' approach was proposed. However, these attempts to mitigate the likely adverse effects of development on the natural character of the coastal environment were considered inappropriate in an area totally free from human components.

The *Coromandel* case involved an appeal against the re-zoning of coastal land at Hahei for subdivision requirements. It was held that the headland concerned was an important feature in the coastal environment and warranted protection in terms of s.3(1)(c). The appeal was allowed, and changes to the scheme disallowed. Judge Turner, in his decision, clearly viewed the word 'natural' as *"that which is created by nature, as distinct from that which is* ***constructed*** *by man".* This view was further elaborated in the context of both the words 'natural' and 'character' with the Tribunal ruling that:

> *"The Point and headland have a* ***natural character****. There are* ***no man-made*** *structures on them. If part of the Te Pare Block were developed in accordance with the requirements of proposed change No.3, we have concluded that no matter how 'sympathetic' the development, the natural appearance of the headland would be significantly changed and diminished and the natural character of the coastal environment at Hahei would be debased."*

Natural character assessed in terms of a spectrum

The decision *Jessop vs. Marlborough District Council (1994) W77/74* is an example where the Tribunal distinguishes between environments which contain a **dominant** natural character (i.e. more pristine) and environments which are of a **composite** nature. The case involved an appeal against the granting of a coastal permit to establish a marine farm in Wilson Bay, Pelorus Sound for scallops on subsurface lines. The area is one of modified and unmodified landscape with a scattering of residential and recreational activity, and obvious signs of shellfish farming. The Tribunal held that the presence of an additional mussel farm in an area largely devoted to that activity was not a matter of national importance. The appeal was dismissed and the Council decision confirmed. In relation to the natural character of the site, the Tribunal held:

> *"Pelorus Sound certainly has character but it cannot be suggested that its present character is natural in the sense of say Milford Sound. The latter has a* ***dominant natural character*** *whereas the former is a* ***composite*** *of nature, forestry, pastoral*

farming, marine farming and other marine activity. Scattered though the environment are numerous buildings".

The case *Director General of Conservation vs. Marlborough District Council (1997) W89/97* highlighted the importance of assessing natural character in terms of a natural continuum. The case involved an appeal against the council for granting a consent for the establishment of two marine farms in Tawhitinui Bay in the Marlborough Sounds.

Tawhitinui Bay is a small open bay with much of the land vested as the Kenny Isle Scenic Reserve. The land is steep and there are no houses, roads or tracks. A 15m tall telecommunications mast stands on the ridge. Only one of the two marine farm sites in the bay have been developed.

The tribunal ruled that the proposal would affect vertical zonation patterns from the shoreline to the sea floor, which were currently intact and a key descriptor of natural character. This biotic pattern was distinctive to the site, and represented an ecological continuum. More specifically, the tribunal stated:

In terms of policy 1.1.1.(b)[13], if we looked outside the immediate location of the marine farm sites, it seems logical to protect this area of Tawhitinui Bay given that the area adjacent to the Kauaora Bay has also been preserved. The two together provide a natural continuum and natural character in sharp relief to other developed parts of both bays.

The tribunal upheld the appeal and the council's decision was cancelled.

3.3.2.2 Components of natural character

Ecological processes

The decision, *Minister of Works and Development vs. Marlborough Sounds Maritime Planning Authority W46/86 (1986)* involved an appeal against consent given by the Council to dump spoil from periodic slips in Ngakuta Bay. It was held that Ngakuta Bay deserved protection under s.3(1)(c) as an **unspoiled** part of the natural coastal environment and a small, though significant, wildlife habitat. Two planning considerations were presented: first, whether the present environment was **natural**, and second, whether the activities proposed by the council were **unnecessary**. After assessment of these considerations, Judge Treadwell in his dictum stated:

"The area is an unspoiled bay in between two settlement areas and therefore serves to enhance the coastal environment by preserving that part in its natural state. It is readily visible from the road to the west, and from other points around the bay it serves as a natural focal point clearly differentiated from other areas affected by man. Coupled with this visual appeal is the fact that the wetland ecological system is undoubtedly the only remnant of that system as yet unaffected by man in this area, and that ecological and biota system is part of the natural character of the coastal environment."

The appeals were allowed and the decision of the Maritime Planning Authority cancelled. The judgement clearly added another dimension to the definition of natural character with the inclusion of *natural processes* such as ecological systems, rather than solely visible landscape features.

Gill and Others vs. Rotorua District Council and Another W29/93 also emphasised the importance of **ecological processes** in defining natural character. As previously discussed, the case involved an appeal against a resource consent to develop 11

[13] Policy 1.1.1(b) states "It is a national priority to preserve the natural character of the coastal environment by: 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."

residential dwellings at Kariri Point on the Tarawera lakefront. It was argued by the applicant that the natural character of the site would remain irrespective of the intended development for a number of reasons. First, the view shafts from under the existing vegetated canopy would be "controlled" in a way to obscure the visual impacts of the development from opposite the lakefront.

Second, it was considered that the property formed only a "transition" landscape, between a Maori reserve and open space and residential development. Third, the site had a history of modification with the regenerating bush being younger than that contained in the adjacent Maori reserve. Fourth, the site was expected to maintain a high degree of visual amenity and natural character, with the existing bush "overflowing" the linear development patterns, in turn creating an "organic" image.

Judge Kenderdine's decision in respect to s.6(a) matters sought to highlight a number of aspects in respect to the interpretation of natural character; in particular, the ecological components. In considering evidence from landscape architects and ecologists the following conclusions were made in respect to the viability of the proposal:

> *"We agree with Mr Garrick that it is the site and **vegetation cover** currently existing which is a key element contributing greatly to the natural character of this area of the lake."*
>
> *"We accept, too, Mr Garrick's opinion that implicit in s.6(a) is the preservation of **ecosystems and ecological processes** and the extent to which those are modified by any development. Specific protection is accorded to the intrinsic values of ecosystems under s.7(d) and this aspect of the natural character of the site has not been given particular regard by the council."*

The case *Director General of Conservation vs. Marlborough District Council (1997) W89/97* concerning an appeal against two marine farms in Tawhitinui Bay emphasised the importance of coastal processes and biotic patterns as important descriptors of natural character.

In discussing policy 1.1.1(b)[14] of the NZCPS, the tribunal stated:

> *"...Miss O'Callaghan identified that the most important values, both within and outside the immediate location, were (perhaps) the coastal processes including the uninterrupted ridge line to sea floor sequence or biotic patterns along the Section of the coastline".*

This case also stressed the importance of biotic patterns as being a key component of natural character. This Tribunal stated:

> *"thus the proposal would affect both the vertical zonation patterns which are currently intact at Tawhitinui Bay and the evidence established that such natural biotic patterns are a key descriptor of natural character".*

Furthermore, the tribunal emphasised the importance of understanding coastal processes in stating:

> *"What this case has highlighted is that the coastal processes need to be understood and recognised and that this area provides a window of opportunity to understand them better."*

[14] Policy 1.1.1(b) states "It is national priority to preserve the natural character of the coastal environment by: 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."

Natural elements, patterns, processes

The Environment Court decision *Brook Weatherwell-Johnson vs. Tasman District Council (1996) W181/96* advances the application of natural processes in determining degrees of natural character to include natural patterns, natural elements and natural processes - the three components being interrelated. Referring to the evidence of expert witnesses, Judge Kenderdine held:

> *"Taking a much broader view of the landscape than Mr Bennett's emphasis on just its visual qualities, Ms Lucas considered that the degree of naturalness depends on the presence of natural elements, patterns, and processes and addresses the largely unbuilt. She considered that at Motupipi Hill there is an interesting interplay between all four elements and concluded that the estuary has a highly natural character from its natural patterns, processes and elements".*

Having visited the Motupipi Hill twice, the Environment Court's view on the natural character of the site is as follows:

> *"Particularly we accept that Motupipi Hill and the estuary complex has a strong natural character with strong natural patterns and the contrast between them make it an important landscape that is little disrupted when considered on a broad scale".*

The decision emphasised the importance of looking beyond the visual components that may or may not contribute to the natural character.

Again, referring to the evidence of expert witnesses, Judge Kenderdine held:

> *"The hill thus creates "the context" for the estuary; its unbuilt aspect, its wildness, remoteness and tranquillity, she considered (and we agree), allow the estuary also to be remote and tranquil".*

The importance of the value of non-visual experiential characteristics are also emphasised in the decision *Steffan John Browning vs. Marlborough District Council (1997) W20/97*. The case involved an appeal against the approval for a coastal permit to occupy a 12-hectare site for a spat holding facility for mussels. The location of the proposed site is the south end of Annie Bay on the eastern shore of Forsyth Island, Marlborough Sounds. Although the area of land adjacent to the site has, up until recently, been extensively farmed, native bush has started to regenerate. There are no residential buildings, forestry, or other similar activities near the site. There is some natural erosion on the lower slopes above the natural rocky shoreline.

In discussing the distinct natural character of Annie Bay, the tribunal ruled:

> *"the coastal segment of this side of the island does remain distinct in the memory".*
> *"...Its isolation, remoteness and air of tranquillity overall appear to contribute to this".*

Landforms

In considering the proposal in *Gill*, the Tribunal referred particularly to the light of evidence presented to them by a landscape architect for the appellant. The landscape assessment presented an interrelationship of components relevant to the overall interpretation of 'natural character'. The assessment first noted the original underlying *landforms*; second, the natural processes responsible for producing the visual features; and third, more obvious natural attributes such as trees, shrubs, fauna, etc. The evidence presented was as follows:

Deborah Bay is surrounded by a catchment of mainly pasture, regenerating bush and scrub, and some exotic plantation. There is a small area of residential land at the centre of the bay with a scattering of 17 to 20 houses. Some of the "built" elements in

the bay include a marina structure, boatshed/house, small reclamation and cottage, and a historic wall. It was argued that the proposal would add to the sprawl of small reclamations on the western side of the harbour, further diminishing its natural character. The Tribunal, in discussing the foreshore, referred specifically to its interpretation in Section 2 of the RMA. Moreover, Judge Kenderdine held:

> *".... The natural character of the subject site in Deborah Bay is firstly its setting in the harbour; secondly that it adjoins a steep land formation falling directly to sea level; and thirdly that there is an easy shelving harbour bed with no sandy foreshore".*
>
> *"Foreshore was one aspect of the natural character of the Bay that went unrecognised by the applicant's witness - as did the value of the little rocky beach given the passive use to be made of this area at low tide. The most telling natural characteristics is the lack of any level area of land adjacent to the foreshore (leaving aside the road) because this aspect has been crucial in determining the very restricted use and development of the land in the vicinity to date, and its lack will limit what is possible in the future".*

3.3.2.3 Considerations in assessing natural character

Listed below are some important considerations in assessing 'naturalness' in terms of Section 6(a) of the Resource Management Act.

ll Parts of the coastal marine area possess natural character

The case *Clyma AR vs. Otago Regional Council W 64/96* is significant in verifying the applicability of natural character under Section 6(a) to all areas of the coast, whether modified or predominantly natural. The Tribunal held:

> *"As to s.6(a) the matter of national importance to be provided for is "the preservation of the natural character of the coastal marine area...". It is not seen as necessary that any particular Section of the coastal marine area should have to exhibit a natural character of national importance or significance to warrant such recognition and provision".*
>
> *"All parts of the coastal marine area have a natural character which results from and can be expressed in terms of location, topography, ground cover and other natural attributes".*
>
> *"This site clearly has a high degree of natural character...its* ***landform*** *is created by* ***natural processes*** *including the Tarawera eruption and its cover of* ***regenerating forest*** *is developing in response to natural processes... The peninsula stands out from its landscape matrix both physically and in terms of its values and is characterised by its difference."*

The appeal was allowed on grounds that the council had failed to take into account the principles of the Treaty of Waitangi (s.8); the provisions of s.6(e) in respect to Maori ancestral land; or other matters of national importance such as s.6(a), (b), and (d); and the provisions under s.7(c), (d), and (e).

Sea bed

The case *Trio Holdings and Treble Tree vs. Marlborough District Council* included the overall state of the seabed in assessing the degree of natural character that remained at the site. The proposal involved the establishment of a marine farm including sponge cultures to be located in the Marlborough Sounds. Judge Kenderdine specifically referred to the evidence from expert witness, Mr Baxter:

> *"It was Mr Baxter's evidence that shell litter from mussel farms markedly transforms the sea floor and has a major impact on the natural character of the*

seabed". "...In Mr Baxter's opinion, natural biotic patterns stand out as a key descriptor of natural character."

The Environment Court ruled:

"As to the natural character of the seabed, that is no longer pristine either. Mr Davidson who was a thoroughly credible witness was quite emphatic that it had been dredged, possibly for scallops. There is no guarantee that the biotic patterns that remain would not be affected by further dredging in the future".

Foreshore

The case *Clyma AR vs. Otago Regional Council W 64/96* highlighted the importance of the **foreshore** in the overall interpretation of natural character. The appeal was against the Regional Council's recommendation to the Minister of Conservation that approval be given to a restricted coastal activity for a 1.6 ha reclamation at Deborah Bay, Dunedin. The purpose of the reclamation was to house an aquatic recreational facility.

Potential naturalness

The importance of 'potential naturalness' in terms of assessing natural character was highlighted in the Environment Court decision *Steffan John Browning vs. Marlborough District Council (1997) W20/97*.

In determining the effect that the proposal would have on the natural character of the coastal environment, the Environment Court raised the question as to whether there was **sufficient** natural character worthy of protection in the first place. The landscape architect for the applicant took the view that the site was of low landscape quality due to the severity of cultural influence, stressing the impact of roads and erosion. The Council was also of the opinion that the area did not have a significant natural character. The Environment Court upheld the evidence presented by the expert witness for the appellant, Ms Lucas, and emphasised the importance of the site in terms of ecological resilience and restoration. Consequently, the appeal was allowed and the Council's decision cancelled. Judge Kenderdine ruled:

"It is not for example the kind of 'working environment' which includes pastoral farming or forestry such as contributed to our approval of marine farm sites elsewhere in other parts of the sounds. The evidence established that the island has a benign climate and the next five years will see significant regeneration of the bush as long as the browsers, such as the goats continue to disappear".

"The experiential recognition of what is natural character and a landscape worthy of protection goes not to the matter of tasteful subjective judgement but to a recognition that the dominant land patterns on the landform consist of scrub and regenerating forest uncluttered by buildings or jarring colours, and an unencumbered land/sea interface. We find that the only unnatural features are the farm road tracks which, in the overall vistas of the landscape, do not overwhelm it to the point where the modification of its natural character is detrimental".

Context

The Environment Court case *Brook Weatherwell-Johnson and Others vs. Tasman District Council (1996)* emphasises the importance of assessing natural character beyond individual components contained within the immediate environment.

There is a need to assess a particular site in context with the wider environment, thus taking into account other components that may contribute to natural character. The Environment Court acknowledged that the natural vegetation cover on Motupipi Hill had been compromised through rural and forestry development. However, any compromises to that vegetation were offset by the context of the surrounding wetland and estuary. Judge Kenderdine ruled:

"We consider that the mix of rural forestry development over the years has compromised some of the site's natural cover but not its natural character which is of a prominent hill in an estuary in a coastal setting. It is largely unbuilt and the regenerating bush in the steep gullies, when seen in context of the surrounding wetland and placid waters of the estuary, offsets any textural compromises to a large degree".

Another case which emphasises the importance of context in assessing natural character is the case *Browning vs. Marlborough District Council (1997)*. In assessing the degree of natural character present at Annie Bay, Marlborough Sounds, the Environment Court made specific reference to the evidence presented by Ms D Lucas, expert witness for the appellant. The Court ruled:

"Ms Lucas identified that the degree of naturalness depends on the evidence for the presence of natural elements and/or natural patterns, and/or natural processes. She stated that it addresses the predominantly unbuilt and as a location does not exist in isolation, consideration of context is relevant. As she stated, and we agree, at Annie Bay, there is an interesting interplay of greater and lesser naturalness which varies at different scales or levels of interest".

"In our conclusion therefore, the natural character of this area is to be assessed in its own maritime context which is one uncluttered by buildings, jetties or exotic forestry blocks or differing textural land patterns apart from those caused by erosion. We agree with Ms Lucas that because it is a small island and because it is in one ownership it is not one to be compared with other landscapes throughout the sounds".

This case also stressed the importance of **land-water relationships** and the **collective characteristics** of a particular coastal environment. The tribunal ruled:

"In summary we see the natural character of the Annie Bay environment as being a stretch of clear uninterrupted water surface and foreshore, a relatively steep island with an uninterrupted outline and low cliff edges, with a uniform scrub and minor forest cover".

Numbers of people experiencing a place or view

The *Browning* case highlighted that the numbers of people experiencing a place or view is not important when deciding whether preservation should be granted or not. The tribunal stated:

"Apart from the farm road and its scars the whole area demonstrates a remoteness, isolation, peacefulness and the unimpeded views spoken of by some of the witnesses. That this solitude is enjoyed at present by only a few people is not necessarily the point; we agree that the consideration of recreational issues by numbers is a narrow view".

Scarcity

The *Browning* case also addresses the issue of scarcity when assessing natural character. The tribunal ruled:

"We accept Mr Browning's argument therefore that the more open space that is alienated by marine farm structures, then the more significant the remaining space becomes".

Size

The question of size raised in the *Director General of Conservation vs. Marlborough District Council (1997) W89/97* case. The appeal concerned two marine farms in Tawhitinui Bay, and the importance of coastal processes and biotic patterns in the area's natural character were highlighted in the case.

The witness, however, went on to state that as a representative example of the coastal processes evident in Tawhitiunui Bay, the area in question was not a large enough representative area to realistically achieve protection. The tribunal disagreed with the witness's statement, and emphasised the importance of protecting even small scattered pieces of coastline, such as this, with such values.

3.3.2.4 Preservation granted in predominantly natural environments

It is clear from analysing case law decisions to date, that preserving natural character is most likely to be afforded in predominantly natural environments which are free from cultural influences (i.e. structures, roads, tracks etc). However, consideration is given to a particular environment's resilience and regeneration potential. Listed below are some judicial decisions, which relate to predominantly natural environments, but which hold differing rulings in respect to the presence or absence of cultural influences. Section 3.5.4 provides a more comprehensive summary of the preservation afforded in natural environments.

The first case to be discussed in respect to the preservation granted of predominantly natural environments *(Minister of Conservation vs. Kapiti Coast District Council A024/94)* was heard under the Resource Management Act in 1994. The appeals challenged approval of a land use consent granted for a rural lifestyle subdivision in the coastal environment situated on the Kapiti Coast, lower North Island. The site is characterised by undeveloped coastal landscape of which the sand dunes form an important component. The dunes have the potential to be very active when their surface vegetative cover is disturbed. Judge Sheppard, in considering the case in respect to Section 6(a) reached the following conclusions:

> *"As well as modifying the landform, as already mentioned, the proposed development would change the landscape by the presence of 17 houses and other structures and the provision of sealed roads and drives. Even though most of them would not be visible from the beach, they would be visible from other public places."*
>
> *"We find that their presence would compromise the natural character of that environment, and* ***would diminish the extent of the coastal environment having that character*** *to meet what we judge to be reasonably foreseeable needs of future generations to experience a sand dune coastal environment having natural character."*

Again we see the importance of landforms as being significant components in the interpretation of natural character. The coastal environment in question was certainly not "pristine", but predominantly "natural". Therefore preservation was granted. The appeal was allowed and the application for a land use consent was refused.

The presence of unnatural elements in predominantly natural environments

The case *Browning vs. Marlborough District Council (1997)* refers specifically to the overall context of the coastal environment in which the proposal was to be located. Although the environment was predominantly natural, the presence of built elements (i.e. roads and tracks) detracted from the natural character of the bay. However, these "unnatural" elements were viewed as being insignificant compared to the natural

components that contribute to the 'natural character' of the bay. The Environment Court ruled:

> *"In summary, we see the natural character of Annie Bay as being a stretch of clear uninterrupted water surface and foreshore, a relatively steep island with an uninterrupted outline and low cliff edges, with a uniform scrub and minor forest cover. The unnatural elements are the transverse lines of the former roads and tracks. We do not see those as being of sufficient detriment to the natural character to justify the addition of an "unnatural element" to the water surface which the proposed farm would represent".*

Potential effects on natural character

The following two cases *J D Lowe and another vs. The Auckland Regional Council A21/94 and Fortzer & Ngawaka vs. Auckland Regional Council RMA 222/93* both involved appeals against Council's decision to decline mussel farm applications at Great Barrier Island. Although both environments retained a high degree of natural character, the **'potential'** introduction of a cultural element in one of the bays procured differing judgements.

The first case, *J D Lowe and another vs. The Auckland Regional Council* was heard in early 1994. The area in question is situated in a predominantly natural coastal environment with minor development in the northern bays. Two landscape architects, representing the appellant and the respondent, held differing views about the impact that the mussel farm would have on the natural character of the coastal area. However, because the area had remained in an unmodified state, the Tribunal considered that it deserved protection in its own right, irrespective of the degree of intrusion that the mussel farm would hold. More specifically, the Tribunal ruled:

> *"In this case, Port Abercrombie predominantly retains its natural character, and the fact that in the past houses have been built in some of the northern bays would not excuse further encroachment; and the part of the harbour in which the appellant's site is located retains its* ***natural character fully.*** *In those respects the case can be contrasted with one for a marine farm, necessarily in the coastal environment and the coastal marine area, where the natural character has been substantially modified."*

The appeal was disallowed on the grounds that the purpose of the Act would be better served by declining the consent.

Shortly after the Lowe decision, the case *Fortzer & Ngawaka vs. Auckland Regional Council RMA 222/93* was heard with the same judge presiding. The coastal area, like the former case, was a predominantly natural environment. However, another applicant had previously been granted permission, by the Minister of Fisheries, for the establishment of a marine farm before the RMA was enacted. Although the marine farm was not in existence, there was still the potential risk that the natural character of the unmodified environment would be reduced. This fact in turn had relevant implications for Judge Sheppard who upheld the appeal. In his decision he stated:

> *"We find that Oneura Bay is in the coastal environment, and that it possesses its natural character at present. The proposed mussel farm would detract, to some extent, from that natural character; but so also would the mussel farm already approved under the previous regime. If that latter mussel farm had not already been approved, we might well have concluded that the appellants' proposal, by diminishing the natural character of an otherwise pristine area, was inappropriate development from which the coastal environment ought to be protected...."**

A similar situation was apparent in the case *Trio Holdings and Treble Tree vs. Marlborough District Council (1996)*. Here, the Environment Court took into account the

potential effects that some bush clearing would have on the natural character of the environment. Judge Kenderdine held:

> *"Referring to the question of natural character Miss McAvinue in reply to a question from the Tribunal acknowledged that the definition of vegetation clearance in the proposed plan means that 9 hectares of bush on the properties behind the marine farm sites could be removed as a permitted activity. Whilst we think this action is unlikely due to the steepness of the land in question, we hold considerable reservations about preventing a nationally important development such as a sponge culture on the proposed site when there is* ***no*** *guarantee that the bush which contributes so greatly to the high natural character of the adjoining land will be preserved for foreseeable generations."*

3.3.2.5 Cases involving largely modified coastal environments

Cases discussed earlier in this report demonstrated that the degree to which the natural character of the coastal environment is preserved depends largely on the degree of "naturalness" present in the environment, the ecological resilience and potential regeneration of the site, and the presence or absence of built elements. The following cases have involved coastal environments which have been modified to varying degrees and have not been afforded protection in terms of Section 6(a) because of the presence of built elements.

Matauwhi Bay, Russell

This case, *Riddell vs. Far North District Council A83/90*, was heard under the Town and Country Planning Act (1977) in 1990. It involved an appeal against the Council making provision for the establishment of a marina in their district scheme. The coastal environment in question, Matauwhi Bay near Russell, was modified to the extent that it already contained a number of swing moorings and the land enclosing the bay contained a small number of houses and a boat club. The appellant claimed that the proposed marina would be inappropriate; would constitute unnecessary development in the coastal environment; and would adversely affect the amenities of the bay. The Tribunal decided, however, that the provision for a marina would not offend the provisions of s.3(1)(c) of the Act, and the appeal was disallowed. Judge Sheppard justified his decision stating:

> *"We accept that any marina complex necessarily detracts from the natural character of the waters in which it is constructed. The natural character of the waters of Matauwhi Bay is already affected by the craft on swing moorings in that bay. In addition, the land enclosing the bay no longer possesses its full natural character.* ***Houses and the boat club and jetty are man-made features which diminish that character."***
>
> *"The district scheme definition of a marina complex is capable of embracing a wide range of developments which would affect the natural character of their site in differing degrees. For example, a marina of the scale of that established at Westhaven, Auckland, would destroy the natural character of Matauwhi Bay. However,* ***a smaller marina sensitively designed, with limited facilities, might reduce the diminishment of the natural character of the bay created by the craft on swing moorings****. By concentrating the berths, a marina might substantially reduce the total areas of the waters of the bay which is devoted to mooring or berthing craft."*

Two important inferences can be drawn from this decision: first, that the presence of built elements was seen to affect the natural character of the coastline; and second, that the extent to which structures are seen to detract from or enhance the existing degree of natural character is subjective. The Tribunal argued that a smaller marina might reduce the diminishment of natural character already created by the swing moorings. However, others may argue that a modern marina complex may further

detract from the existing natural character of which the swing moorings are a part. The Tribunal in this case entered into a whole new area of interpretation in placing judgement upon an extremely subjective issue, that being the likelihood of **structures** enhancing or detracting from an environment where natural character was already compromised.

Avon-Heathcote Estuary

Another, earlier case heard under the Town and Country Planning Act, which was dismissed because of the introduction of built elements, was the case *Combined Estuary Association vs. Christchurch City Council A4/88*. The applicant owned land fronting the Avon-Heathcote estuary, and wished to extend an existing jetty that protruded from the sea wall abutting his property. The case primarily centred around the refusal of the council to grant consent, because the jetty stood on what was designated in the District Scheme as an existing road. Section 3(1)(c) considerations were of relevance in this case, but it was considered by Judge Skelton that the natural character was already compromised. His Honour stated:

> *"We accept that much of the estuary and its environs have a natural character worthy of preservation as a matter of national importance. In this particular part of the coastal environment, however, it is our judgement* ***that the hand of man has become the dominant influence****. Although there are natural amenities, which, of course, the applicant himself seeks to take advantage of, we do not think that this part of the coastal environment has a sufficiently significant natural character to be worthy of protection,* ***afforded by the sub-section. It is largely a built up area fronting on to the estuary.****"*

Waihi Beach

A more recent decision under the Resource Management Act 1991, *Sayers HW vs. Western Bay of Plenty District Council AO98/92*, also treated the issue of natural character in reference to the environment's currently modified state. The Tribunal held that placing a huge amount of fill on a Waihi Beach property constituted a notable detraction from the amenities of the area. Judge Bollard, in having regard to issues arising under Section 6(a) of the Act, assessed the likely degradation of the natural character:

> *"A point at issue in my mind concerns the requirements in the Resource Management Act 1991 (s.6(a)) to preserve the natural character of the coastline. Clearly the fill material, comprising clayey material of volcanic origin, does not preserve the natural character of the coastline, and when hazards of sea erosion and flooding occur, the fill material will be in danger of being eroded by the waves or stream, and deposited on the adjacent beach. However, in that the adjacent beach front at nearby Shore Road is likewise far from its "natural" state, as evidenced from its present visual architecture of houses located much too close to the sea and protected by massive rip-rap boulders instead of a sandy frontal dune, then perhaps the argument for removing the fill at this site under consideration in order to return the contour to its relative natural state is somewhat weakened."*

Preservation of natural character not limited to predominantly natural environments

It cannot be presumed, however, that because the coastal environment is already substantially modified, development will be designated 'appropriate' in respect to Section 6(a). As can be seen from the 1995 decision, *Thomas RD and MD vs. Marlborough District Council W016/95*, effects on the existing natural character are still to be considered. The case, which was later upheld in the High Court, deals with the appellants' initially unsuccessful application for a coastal permit to establish a 1.5 ha marine farm at Kaikoura Bay where the natural character had already been compromised by a number of marine farms operating in the vicinity. The Council's decision to decline the application came largely from likely navigational hazards, but

the issue of natural character was also considered. The Tribunal considered the application in terms of Policy 1.1.1 of the New Zealand Coastal Policy Statement, which seeks to preserve natural character by encouraging use or development to take place in those areas where the natural character has already been compromised. However the Tribunal in referring to Policy 1.1.1 further stated:

> ***"That policy is not to be taken as a blank cheque for encouraging unlimited further development of the sort proposed in the present case simply because the environment has been significantly modified****. It is still necessary to take account of the effects of such use or development on the values of what is left of the natural character of the coastal environment, both within the immediate area affected by the application and outside of it."*

3.3.2.6 Strict application of the term preservation

Strict adherence to the plain meaning of "preservation" under the first test in Section 6(a) could essentially preclude much development. However, it is suggested that case law confirms that such a strict interpretation cannot be applied (Bielby 1996). These reasons are outlined below:

- The protection element contained in the Section 6(a) clearly provides for **appropriate** development.

- Section 6(a) is subject to "sustainable management" contained in Section 5 which enables people and communities to provide for their social, economic, and cultural well being (see NZ Rail 1994).

- Policy 1.1.1 in the New Zealand Coastal Policy Statement seeks to restrict inappropriate development, but clearly anticipates appropriate development will occur.

- Preservation of national character may give way to appropriate development where this is "nationally suitable or fitting" (see NZ Rail 1994). It may also give way to matters of national importance not included in Section 6 (Inter-island Fast Ferries).

- The Board of Inquiry Report (1994) states that "preservation is not to be achieved at all costs".

- The court has held, in the case *Clyma*, that all parts of the coastal marine area possess natural character. If so, Section 6(a) cannot logically seek to strictly preserve natural character as this would prevent any modification to any part of the coastal marine area.

3.3.3 Coastal Environment

The term 'coastal environment' is not defined in the RMA 1991, but was interpreted by the Planning Tribunal under the previous legislation. The draft New Zealand Coastal Policy Statement (1992) provided a rather comprehensive definition of "coastal environment" which read:

> *"an environment in which the coast is a significant part or element. The coastal environment will vary from place to place depending upon the extent to which it affects or is (directly) affected by coastal processes and the management issue concerned. It includes at least three distinct, but interrelated parts:*
>
> - *the coastal marine area*
> - *the active coastal zone; and*
> - *the land backdrop.*

The coastal environment includes at least the coastal marine area, the water, plants, animals, and the atmosphere above it; and all tidal waters and the foreshore whether above or below mean high water springs, dunes, beaches, areas of coastal vegetation and coastal associated animals, areas subject to coastal erosion or flooding, salt marshes, sea cliffs, and coastal wetlands, including estuaries, and in the absence of such features (particularly in urban areas where the natural shoreline had been modified), all of the land that extends 40 metres inland of mean high water springs".

The Board of Inquiry document (1994) states that because Parliament did not define the term 'coastal environment' in the Act, the following case law interpretations are considered appropriate. The term 'coastal environment', was defined firstly in the case Northland Regional Planning Authority vs. Whangarei County Council 463/76 and was described as follows:

*"We therefore hold that the term "coastal environment" **is an environment in which the coast is a significant part or element,** but clearly it is impossible to give an abstract definition which is capable of simple and ready application to any given situation. **What constitutes the coastal environment will vary from place to place and according to the position from which a place is viewed**. Where there are hills behind the coast, it will generally extend up to the dominant ridge behind the coast. But where the land behind the coast is generally flat, there may be great difficulty in defining the coastal environment."*

The second interpretation of coastal environment was that held in the Physical Environment Association of the Coromandel (Inc) vs. Thames Coromandel District Council (1982) case. Judge Turner interpreted the coastal environment as encompassing the following features:

"The environment is one's surroundings; what one perceives at a particular time and place. Coastal environment means an environment in which the coast is a significant part or element".

He also referred to particular elements of the coastal environment. In this case, it was the headlands abutting Hahei beach in the Coromandel Peninsula:

"Headlands are important features of the coastal environment. They are important because of the close relationship between hill and sea. They are also important because they enclose the environment when viewed from a distance, and because they are an obvious part of what is perceived".

The Report of the Board of Inquiry on the New Zealand Coastal Policy Statement (1994) considered that these definitions had stood the test of time, and that there was no such need to alter them. The Board further states that the Act does not call for any modification of them, notwithstanding that:

a) the term 'coastal environment' is now used as a 'stand alone' term in a number of places - see s.56, s.58, and s.64(2)
b) it appears, from Section 6(a), that the coastal environment now specifically includes the coastal marine area.

The Board of Inquiry commented that it is unsuitable to "mechanically" apply the above listed definitions to a specific area to determine whether or not a portion of land is or is not within the coastal environment. It required that each environment be **individually** assessed. In other words, the Board saw great difficulty in devising a definition that can be applied to all environments in question. Such a view was judicially interpreted under the Town and Country Planning Act (1977) in the case *Furness Farms Ltd vs. Sunny Points Estates Ltd 69/77* which concerned rural land surrounding the Akaroa Township.

The Tribunal referred to the definition of coastal environment given in the *Whangarei County Council* case, but went on to conclude:

> *"We are generally in accord with the definition of coastal environment as contained in that decision but we do not consider it of general application,* ***each particular area requiring a particular consideration****. If that decision were to be strictly applied to the Akaroa Harbour Basin most of the county could be held to be part of the coastal environment".*

That decision was also upheld in a later case under the Town and Country Planning Act, which also questioned how far inland the coastal environment extended. The case *Hay vs. Banks Peninsula District Council C 44/90* involved an appeal against the council refusing consent to erect a house and farm buildings on land that was zoned Rural. Farm buildings in this zone were permitted *"except in a position where such buildings might...detract from the scenic character and visual amenities of the rural environment"* (Butterworths 1990). The council argued that a dwelling erected on this site would compromise the natural character of the coastal environment. In seeking to determine whether the coastal environment extended to the property in question (in order to seek protection under s.3(1)(c)), Judge Willy, referred to both the *Furness Farms and Whangarei County Council* cases. In his dictum he stated:

> *"If we applied the broad definition given in the Whangarei County Council case then all of the land between the sea and the skyline surrounding the Lyttelton Harbour Basin would be part of the coastal environment, or when land is within or without the "margin" of a lake or river. It is one of those theoretically difficult questions which will usually yield to the facts and a liberal dose of common sense. A variety of matters must be taken into account, including on the facts of this case the significant residential development between the foreshores at Governors Bay and the proposed building site.*
>
> *We are satisfied that it was not part of Parliament's intention in enacting s.3(1)(c) to apply that provision in a blanket way to an area the size of those parts at Lyttelton Harbour which have some (albeit distant) vista of the sea. Whatever portion of the appellant's land might be said to be part of the coastal environment we are satisfied on evidence that the building sites are not".*

The Tribunal in the case *Coutanche vs. Rodney District Council W94/94* declared two areas as being within the "coastal environment". The first area was not visible from the coastline because of sand dunes and forestry but was found "clearly within the coastal peninsula" and having a degree of isolation and coastal proximity". The second area contained rugged high cliffs extending inland some 10 kilometres. The coastal environment identified within the area contained a valley that comprised inland lakes, inland dunes, and a significant wetland (Parliamentary Commissioner for the Environment 1996).

The Board also referred to the meaning of the term 'environment', in its report. It held that the 'explanation' of the term environment in Section 2(1) of the Act, is not a definition (notwithstanding that the word 'definition' is used in that 'explanation'). That explanation reads:

> *"In this Act, unless the context otherwise requires...."environment' INCLUDES -*
>
> *a) ecosystems and their constituent parts, including people and communities*
> *b) all natural and physical resources*
> *c) amenity values*
> *d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters."*

The meaning of the word 'environment' according to the Board (1994) is simply

> *"the surroundings in which some person or thing lives or exists";*

and all that the statutory 'explanation' does is to specifically include in an environment items which one may not immediately think of as being part of that environment (Report of the Board of Inquiry 1994).

3.4 Protection from Inappropriate Subdivision, Use, and Development

3.4.1 Protection

Like the word preservation, "protection" is not defined in the RMA or NZCPS, but was interpreted in the draft 1992 NZCPS as encompassing the following aspects:

> *"'Protection' is given its meaning by its use in Sections 6 and 58 of the Resource Management Act 1991. 'Protection' is used in the context of the adverse effects of inappropriate subdivision, use, and development. Protection can be achieved by avoiding, remedying or mitigating such effects." (Draft NZCPS 1992).*

3.4.1.1 Protection is not absolute

An important point to recognise is that coastal environments, irrespective of being almost pristine, do not necessarily warrant **absolute** protection from development. This notion is regularly cited in case law and refers to the judgement in *Environmental Defence Society vs. Mangonui County Council (1989)* where the Court of Appeal ruled, **"absolute protection is not to be given to the coastal environment; that a reasonable rather than strict assessment is called for"**.

This ruling was obviously the rationale behind the Tribunal's decision in the case *Otehei Bay Co Ltd vs. Bay of Islands County Council A101/85*. The appeal opposed Council approval for a consent to construct a jetty for a tourist operation, which consisted of an hour-long cruise in the beauty and tranquillity of a remote cove. The foreshore was a scenic reserve, behind which the applicant leased land.

Although judged some years prior to the *Mangonui* case, the Tribunal certainly took the stance that the coastal environment is not entitled to absolute protection. The Tribunal considered two fundamental issues in deciding the case. First, it considered whether the proposal amounted to unnecessary development in terms of s.3(1)(c) because the applicant's cruise passengers were able to land at another nearby already established wharf. Second, it had to decide the balance between introducing a man-made structure in part of the coastal environment with a mainly natural character, and benefiting the public with the ability to enjoy the scenic reserve. Judge Sheppard clearly favoured benefiting the public in this question of balance. He stated:

> *"In evaluating the conflicting factor we keep before us that the protection of the physical environment and the natural character of the coastal environment are matters of national importance. Even so, in the particular circumstances of this case, it is our assessment that the disturbance to the Section of the community which at present is able to enjoy Deep Water Cove for its natural beauty and as an anchorage cannot prevail over the opportunity to provide access to a public scenic reserve by the general public in a way consistent with the provisions of the district scheme and the importance of tourism, and a way calculated to create minimal impact".*

An earlier case heard under the TCPA in 1982 also demonstrated that absolute protection is not granted to unmodified coastal environments. The case *Harward vs. Waimea County Council (1982)* involved an appeal against the Council issuing a consent to erect a 66m high radio transmitting aerial in an unmodified environment near Nelson. The appeal was dismissed on the grounds that the visual intrusion of the mast would not cause the loss of any significant visual amenity. Judge Skelton held:

> *"We accept the applicant's assertion that the only adverse effect, from a land use planning point of view, which its proposal may have is one of a visual intrusion into the natural character of this particular coastal environment. It becomes necessary for us to determine, therefore, whether that intrusion is of such significance as to require us to give this coastal environment the protection accorded to it by s.3(1)(c)."*

Although we have seen from the cases described above that protection is not absolute, it is worthwhile to conclude this Section with a profound statement read by Justice Bisson in the Court of Appeal in relation to the *Mangonui* case.

> *"... the emphasis of Section 3(1)(c) is conservation. Although certainly not to be pursued at all costs, it has been laid down as a primary goal; and this must never be lost sight of".*
>
> *".. .Once the door has been opened to allow development which fails, it is difficult to close the door without some permanent damage, some scar, remaining".*

3.4.2 Inappropriate

The word "inappropriate" has a different interpretation from the TCPA term "unnecessary".

The most prominent case to be heard under the RMA in respect to the interpretation of the word 'inappropriate' is the case *NZ Rail vs. Marlborough District Council AP 169/93* which was heard in the High Court in 1993 and subsequently dismissed. The appellant presented six principal arguments. The following three are of relevance to Section 6(a):

- The Planning Tribunal erred in law when it held that the provisions of Part II of the Act should not be given primacy when considering resource applications pursuant to s.104 of the Act.

- The Planning Tribunal had misdirected itself as to the interpretation of s.6(a) of the Act by holding that the preservation of natural character of the coastal environment **could justifiably be set aside** in the case of a "national or suitable or fitting" use or development.

- The Planning Tribunal had misdirected itself as to the interpretation of Sections 5 and 6 of the Act, as it was an inappropriate use or development of the coastal environment to undertake a development of this nature and significance where there was no evidence that the facilities would be used once they were built.

The decision in respect to the relationship of Section 6(a) in achieving the purpose of the Act was covered earlier in this chapter. In recapping that decision, it was interpreted judicially by Judge Skelton and later upheld by Justice Greig, **"that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management."** Judgements concerning the word 'appropriate' by the Planning Tribunal were also upheld by the High Court. More specifically 'appropriate' in the former Tribunal case by Judge Skelton held the following interpretation:

"Having regard to the foregoing, it is our judgement that s.6(a) of the Act should be applied in such a way that the preservation of the natural character of the coastal environment ***is only to give way to suitable or fitting subdivision, use, and development."***

"..when considering appropriateness as distinct from need, it has to be remembered that it is ***appropriateness*** *in a* ***national context*** *that is being considered. It is not, for example, appropriateness in either a regional or local context."*

*"Consequently, the development being considered for the purposes of Section 6(a) of the Act would have to be "****nationally*** *suitable or fitting" before preservation of the natural character of the coastal environment should justifiably be set aside".*

"..If a development was appropriate nationally, that is to say a suitable or fitting development at a national level, preservation of the natural character of the coastal environment may have to give way. In our judgement that is the case here, although as we have just said, in reality we do not think the natural characteristics of the coastal environment of Shakespeare Bay will be severely affected."

Justice Greig in the High Court decision further elaborated on the definition of "inappropriate" and made the following points:

"'Inappropriate' subdivision, use and development has, I think, a wider connotation than the former adjective "unnecessary".

"'Inappropriate' has a wider connotation in the sense that in the overall scale there is likely to be a broader range of things, including developments which can be said to be inappropriate, compared to those which are said to be reasonably necessary".

"..The achievement which is to be promoted is sustainable management and ***questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision."***

A more recent case, which referred to both the Mangonui and *New Zealand Rail* case in determining whether a development is "appropriate" in a national context, is the case *Minister of Conservation vs. Kapiti Coast District Council A024/94*. Judge Sheppard considered the following facts in deciding whether a coastal subdivision on the Kapiti Coast was 'appropriate' in terms of Section 6(a):

"Remembering that the coastal environment is not entitled to absolute protection, that preservation of its natural character is not to be achieved at all costs, we find that the present proposal is ***inappropriate*** *in the following four respects. First, although the subdivision has been designed with skill and care so that the proposed houses would generally not be visible from the beach, it would involve substantial* ***disturbance to the landform of the dunes, and risk further unintended change to that form****. Secondly, it would introduce 17 houses and other structures, together with formed and sealed roads and drives, into a substantially* ***would compromise its natural character****. Thirdly, it is a speculative subdivision, no purchasers of the proposed lots having been identified. Fourthly, it would be contrary to the policies as well as the rules of the relevant part of the transitional district plan."*

The Tribunal in judging the case *Clyma AR vs. Otago Regional Council (1996)* found the proposal for a reclamation to house an aquatic recreation facility at Deborah Bay to be an inappropriate use, and development. The site was predominantly natural, but did contain some built structures. Judge Kenderdine ruled:

*"We have concluded the aquatic recreation facility in this bay is **inappropriate; it offends the principles of sustainable management** in that it not only modifies an area we consider retains considerable natural character but is suspect in what it sets out to achieve. We have grave reservations whether the authorities' expectations for boating activities and public use can be accommodated. We consider too, that it will diminish the extent of the lower harbour's rural coastal character for what we are expected to judge as the reasonably foreseeable needs of future generations to experience."*

3.4.2.1 Appropriate subdivision, use, and development

The Report of the Board of Inquiry (1994) provides a useful definition of what is considered "appropriate" subdivision, use, and development in terms of Section 6(a) of the Resource Management Act.

"Coastal environments are to be protected from 'inappropriate subdivision, use, and development' - a statement which infers that appropriate subdivision, use and development can be permitted at appropriate places in coastal environments. Whether a subdivision, use or development is appropriate, will in part be determined by the extent to which that location still has a natural character, and the extent to which that natural character will be affected by the subdivision, use or development."

The case *Brook Weatherwell-Johnson vs. Tasman District Council (1996)* involving an appeal against a proposed Plan change to allow a residential development at Motupipi Hill, Takaka touches briefly on the interpretation of "appropriate". Judge Kenderdine held:

*"Whilst need may be an element of appropriateness in considering s.6(a) of the Act, the **demonstration of need** does not establish that appropriateness. The word denotes a proposal which is "specially suitable, proper or fitting" as the term is defined in the New Shorter Oxford Dictionary".*

Recent case law decisions are briefly discussed below to provide an indication of judgements by the Environment Court in respect to appropriate subdivision, use, and development.

The case *Ngatiwai Trust Board vs. Whangarei District Council NZRMA 269* involved an appeal to overturn consents to subdivide land to establish a camping ground at Whananaki North. The granting of both land use and water consents was challenged on the grounds that the land was waahi tapu. In respect to preserving the natural character under Section 6(a) the proposal was considered 'appropriate' because it positively assisted in coping with the public demand in the peak Christmas holiday period. It was held by the Tribunal that the camping ground would not detrimentally affect the natural character of the coastal environment and the scenic beauty of the coastline, given its transient pattern of relatively intense use in the Christmas holiday period and otherwise at specified times such as Easter and Labour weekend. The size of the camping ground did not exceed the area's environmental capacity. Furthermore, the proposal would be in accordance with the Section 5 of the RMA.

The case *Reynolds DM & SL vs. Kaipara District Council, Northland Regional Council (1996) A031/96* involved an appeal against the Council for granting resource consents for a new camping ground on rural land at Matakohe, a minor headland in the upper reaches of the Kaipara Harbour. The site was in pasture and contained some derelict farming structures. The Tribunal ruled:

"Our own judgement, having visited the site and locality, is that the site is sufficiently remote from the harbour, and the nature of the activity and the impact of the buildings would be such that the proposal is not inappropriate subdivision,

use, or development, from which the coastal environment should be protected. Indeed we find that the buildings would scarcely be visible from the harbour, and that the activity would have no more than minor impact on the coastal environment."

Avoiding, remedying and mitigating effects - non-degradational development

Another factor in determining the appropriateness of development is whether the adverse effects on the coastal environment can be mitigated. This was highlighted in the Court of Appeal case *Environmental Defence Society vs. Mangonui County Council 13 NZTPA 1977*, where Justice McMillan, dissenting in the decision, stated:

> *"As already noted, by implication it recognises that there will be some development which is necessary. There can also be development which is unnecessary and which may not interfere at all with the natural character of the coastal environment or may interfere with it in only an insignificant way.* ***Such may result from the way in which the development is planned****".*

The planning of a proposed development was also a factor considered in a case decided under the Town and Country Planning Act. The case *Ritchie vs. Raglan County Council (1982) 9 NZTPA 15* involved an appeal against a consent granted for a motel at Whale Bay, in the Raglan area. The application was for a "conditional use" which was made subject under the Act to Section 3. The Tribunal stated that the capacity of the locality was considered to be an extremely important factor:

> *"The need to keep development within the capacity of a locality is important, because too many people can destroy the very qualities which they seek to find and enjoy there".*

Moreover, the Tribunal presented its view on the most effective way that land use planning could give effect to s.3(1)(c). Such views, according to Caunter (1992), incorporated the need:

- to group holiday accommodation in specific locations and not allow it to become scattered along the coast
- to keep the form and scale consistent with the need for accommodation in the coastal environment and the capacity of the locality
- to keep the physical appearance of the structures in sympathy with and subservient to the environment.

The Tribunal eventually consented to a lesser scale of development, allowing one dwelling and five motel units (which was to be proven as a necessity), rather than the nine units originally proposed.

The case *Mataka Station vs. Far North District Council A069/95* involving a papakianga housing at Te Puna Inlet at the Bay of Islands was considered an "appropriate" development in terms of Section 6(a) subject to fairly strict conditions placed on mitigation. Such conditions related to:

- landscaping work being completed within six months of a dwelling being occupied
- no additional bush to be felled
- some of the proposed dwellings to be positioned closer to the bush line, and the houses to be painted in dark natural colours (e.g. dark browns, greens, greys)
- before each building consent is issued a landscape plan shall be prepared showing the proposed planting of trees and shrubs to mitigate the effect of the structure on the environment.

However, a 'design with nature' approach may not be sufficient mitigation of likely adverse effects. In the case of *Physical Environment Association of the Coromandel (Inc) vs. Thames Coromandel District Council* the Tribunal decided that avoidance was the only acceptable remedy in a situation where the natural character was virtually unmodified by built elements. This appeal involved the re-zoning of coastal land at Hahei for subdivision use. The Tribunal observed that there were "man-made structures" on the Point and Headland in question and concluded that:

> *"No matter how 'sympathetic' the development, the natural appearance of the headland would be significantly changed and diminished and the natural character of the coastal environment at Hahei would be debased."*

Similarly, in *Minister of Conservation vs. Kapiti Coast District Council*, remedying or mitigating the likely adverse effects was not considered adequate, and avoidance was ruled. Among the reasons given for the decision, Judge Sheppard observed that

> *"Although the subdivision has been designed with skill and care so that the proposed houses would generally not be visible from the beach, it would involve substantial disturbance to the landform of the dunes, and risk further unintended change to that form."*

3.5 Combining "Preservation" and "Protection" Requirements

3.5.1 Linked by "And"

The inclusion of a comma between the preservation and the protection elements is believed to be a significant change, and signals that the two tests are quite separate. The old method of running the two tests together is no longer considered acceptable (Ministry for the Environment 1991).

3.6 Conclusion

In this chapter the review of case law has made it clear that there is a duty to consider the *"preservation of the natural character of the coastal environment"* because it is a matter of national importance. However, this duty is one means towards achieving the overall purpose of the Act - sustainable management - and in some instances may be outweighed by other matters of national importance. Case law has shed some light on the relative priorities of these matters.

It was noted in the previous chapter that a definition of 'natural character' was consciously omitted from the Resource Management Act and the New Zealand Coastal Policy Statement. However, various attributes of natural character have been identified in case law and a general picture of what is meant by the term has gradually evolved. At a broad level, natural character is generally regarded as being a **product of nature** and does not include features constructed by man. The various components, which have been recognised by the Court as contributing to natural character, are highlighted in the summary below.

Section 6(a) requires two different and apparently contradictory considerations: - firstly the *preservation* of the natural character as it exists at the time of an application, and secondly, whether the development is *appropriate*. Parliament clearly intended that there should be a strong test for the natural character clauses, when it decided to use the word 'preservation' instead of 'protection.' Nevertheless, preservation is subject to the primary purpose of sustainable management in the Act. In terms of preservation of

natural character, and protection from inappropriate subdivision, use and development, case law has generally recognised a spectrum: - areas of high natural character require the greatest degree of preservation and protection, whereas environments that have been modified require less preservation. However, the Court has also been quite clear that the effects on the **remaining** natural character in a modified environment must be considered and may, though diminished, still warrant preservation or protection. Summaries of decisions relating to preservation and 'inappropriate' are set out below.

3.7 Chapter Summary

Case law - matters of national importance

In judging **conflicting matters** of national importance, the Tribunal has ruled that a more specific objective may properly be given priority over a general objective.

(Knuckey vs. Taranaki District Council 1978)

*"The **interests of the district are subordinate** to the declared matters of national importance".*

(Environmental Defence Society vs. Mangonui County Council, Opoutere vs. Thames Coromandel District Council 1989).

Matters of national importance **can be overridden** by developments that are nationally suitable or fitting.

(NZ Rail vs. Marlborough District Council 1993)

*"The achievement that is to be promoted is the **sustainable management** and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision."*

(Minister of Conservation vs. Kapiti Coast District Council 1994)

There is a **duty to enquire** under both Sections 6 and 7, but because matters of national importance are to be given greater weight than "other matters" set out in Section 7, the standard of duty is higher under Section 6.

(Gill vs. Rotorua District Council and Schwanner 1993)

Irrespective of their functions under s.30 and s.31, consent authorities **must have regard to all Part II matters.**

(Royal Forest and Bird Society of NZ Inc vs. Manawatu Wanganui Regional Council 1995)

Case law - preservation of the natural character of the coastal environment

"Preservation" is a stricter requirement than "protection," meaning, *"no change, whereas protection involves a value judgement as to the degree of protection necessary and how it can be afforded."*

(Ministry for the Environment report to Select Committee on Supplementary Order Paper 22)

Preservation of the natural character is subordinate to the primary purpose of promoting sustainable management.

(NZ Rail vs. Marlborough District Council 1993, Trio Holdings vs. Marlborough District Council 1996)

Unmodified coastal environments (free from built elements) retain the highest degree of natural character and therefore have highest priority for absolute protection and preservation.

(Lowe and another vs. The Auckland Regional Council 1994)

Modified coastal environments have diminished natural character so do not warrant the same amount of preservation as predominantly natural environments.

(Riddell vs. Far North District Council 1990,
Combined Estuary Association vs. Christchurch City Council 1988)

In **modified environments,** *"it is still necessary to take account of the effects of...use or development on the values of* ***what is left of the natural character*** *of the coastal environment."*

(Thomas RD and MD vs. Marlborough District Council 1995)

Case law -the natural character of the coastal environment

The word 'natural' is a word indicating **a product of nature** and can include such things as pasture, exotic tree species (pine), wildlife both wild and domestic...**as opposed to man-made structures**, roads, machinery etc."

(Harrison vs. Tasman District Council 1993)

The degree of naturalness goes beyond just the visual. It depends on the presence of **natural elements, patterns, and processes** and addresses the **largely unbuilt**.

(Brook Weatherwell-Johnson and Others vs. Tasman District Council 1996)

Ecological and biotic systems are part of the natural character of the coastal environment.

(Minister of Works and Development vs. Marlborough Sounds Maritime Planning Authority 1986)

Landforms created by natural processes are part of 'natural character.'

(Gill and Others vs. Rotorua District Council and Another 1993)

All parts of the **coastal marine area** possess natural character.

(Clyma vs. Otago Regional Council 1996)

It was held that the **sea floor** is a component of natural character.

(Trio Holdings and Treble Tree vs. Marlborough District Council 1996)

Houses and the boat club and jetty are **man-made features**, which **diminish** the natural character.

(Riddell vs. Far North District Council 1990)

Context is an important consideration in assessing the degree of natural character present in the coastal environment.

(Brook Weatherwell-Johnson and Others vs. Tasman District Council 1996,
Steffan John Browning vs. Marlborough District Council 1997)

The **potential naturalness** of an environment is an important consideration in assessing natural character.

(Steffan John Browning vs. Marlborough District Council 1997)

Size is less important than the values present - even small, scattered pieces of coastline where coastal processes are important warrant protection.

(Director General of Conservation vs. Marlborough District Council 1997)

The **numbers of people** experiencing a place is **not relevant**. Factors of remoteness and peacefulness may be part of natural character in a place only experienced by a few.

(Browning vs. Marlborough District Council 1997)

Case law - protection from inappropriate subdivision, use, and development

"Absolute protection is not to be given to the coastal environment; that a reasonable rather than strict assessment is called for."

(Environmental Defence Society vs. Mangonui County Council 1989)

"Inappropriate" subdivision, use and development has a wider connotation than **"unnecessary"**, in that there is likely to be a broader range of developments which are considered inappropriate compared to those reasonably necessary.

(NZ Rail vs. Marlborough District Council 1993)

Appropriateness is **considered in a national context**, not a regional or local context.

(NZ Rail vs. Marlborough District Council 1993)

Development can be **planned** so that there is little or no interference with natural character.

(Environmental Defence Society vs. Mangonui County Council 1989)

A **'design with nature'** approach, proposed to mitigate likely adverse effects, was considered inappropriate in an unmodified coastal environment.

(Physical Environment Association of the Coromandel (Inc) vs. Thames Coromandel District Council1982)

The need to keep development within the **capacity of a locality** is important, because too many people can destroy the very qualities that they seek to find and enjoy there.

(Ritchie vs. Raglan County Council 1982)

Factors or tests that have contributed to a subdivision, use or development being considered **inappropriate** include:

- **Disturbance to dunes**, introduction of **houses** into a substantially unmodified area, **speculative** nature of the subdivision, **conflict** with policies and rules in the district plan.

  (Minister of Conservation vs. Kapiti Coast District Council 1994)

- **Modification** of an area that retains considerable natural character, reservations about whether the expected boating activities and public use could be **accommodated**.

  (Clyma vs. Otago Regional Council 1996)

- Development in an area totally **free from human** occupation.

  (Coromandel vs. Thames Coromandel 1982)

- **Refuse station** deemed inappropriate in a coastal environment.

  (Harrison vs. Tasman District Council 1993)

Factors or tests that have contributed to a subdivision, use or development being considered ***appropriate*** include:

- Development that has been designed in such a way **to avoid, remedy and mitigate** the adverse effects on the natural character of the coastal environment.

  (Mataka Station vs. Far North District Council1995)

- Provision of **public access** to a public scenic reserve and provision for tourism.

  (Environmental Defence Society vs. Mangonui County Council 1989)

- The proposal positively assisted with **coping with public demand,** had a **transient pattern** of relatively intense use, the area could cope with the camp ground's **capacity**.

  (Ngatiwai Trust Board vs. Whangarei District Council)

- The site was sufficiently remote from the harbour and the buildings would scarcely be visible.

  (Reynolds DM & SL vs. Kaipara District Council 1996)

Court Rulings For Predominantly Natural Coastal Environments

Case	Coastal Environment	Court ruling (✓ = preservation granted)	Reason
Physical Environment Association vs. Thames Coromandel District Council (1982) TCPA	**Headland at Hahei** Point and headland have a natural character with no man-made features on them.	**Tribunal** Appeal upheld. Consent to subdivide land refused. ✓	There was no 'need' for the subdivision. Moreover, the natural appearance of the headland would be significantly changed and diminished and the natural character of the coastal environment at Hahei would be debased.
Harward vs. Waimea County Council (1982) TCPA	**Nelson** Flat, open and largely unmodified coastal landscape.	**Tribunal** Appeal dismissed. Consent granted to erect 66m high radio transmitting aerial.	Visual intrusion not significant enough to grant preservation under s.3(1)(c).
Minister of Works and Development vs. Marlborough Sounds Maritime Planning Authority (1986) TCPA	**Ngakuta Bay, Marlborough Sounds** Unmodified part of the coastal environment with a wildlife habitat.	**Tribunal** Appeal upheld. Consent to dump spoil in the bay refused. ✓	Present environment contains a significant natural character, and activities deemed 'unnecessary'.
Environmental Defence Society vs. Mangonui County Council (1989) TCPA	**Karikari Peninsula Northland** Unmodified countryside with a diverse array of coastal landscapes including bays, inlets, rocky headlands, and cliffs.	**Court of Appeal** Appeal upheld. Consent to construct a tourist resort on the peninsula declined. ✓	The tourist resort was declared 'unnecessary' in that it failed to be of national importance. The natural character therefore could not be compromised. The benefits gained for the district were not matters of national importance therefore could not be weighed against the preservation of natural character.
Opoutere Residents and Rate Payers Association vs. Thames Coromandel District Council (1989) TCPA	**Opoutere Beach, Eastern Coromandel** Peninsula Beach does not have close settlement immediately behind it. Pro-posed site situated next to a wildlife reserve.	**Court of Appeal** Appeal upheld. Consent to operate a camping ground in the area declined. ✓	Developer could not show a necessity sufficient to override the national interests of preserving the natural character of the coast.

Case	Coastal Environment	Court ruling (✓ = preservation granted)	Reason
Otehei Bay Co Ltd vs. Bay of Islands County Council (1989) TCPA	**Otehei Bay Bay of Islands** Coastal Environment had a "mainly" natural character and contained a scenic reserve.	**Tribunal** Appeal disallowed. Consent granted to build a jetty in the bay.	The jetty would provide public access for the community and tourists to enjoy the scenic qualities of the bay.
Gill and Others vs. Rotorua District Council and Another (1993) RMA	**Tarawera Lake Front** Site has a high degree of natural character through existing landforms, vegetation, and natural processes.	**Tribunal** Appeal upheld. Consent to develop lakefront refused. ✓	Appeal upheld on the grounds that the Council overlooked Tangata Whenua issues. The present natural character of the lakefront was not considered, in particular ecological processes.
Harrison vs. Tasman District Council (1993) RMA	**Motupipi Estuary, Takaka** Estuary has a largely natural character. Contains a grassed reserve and few signs of human structures.	**Tribunal** Appeal upheld. Consent to develop a rubbish dump near estuary refused. ✓	Inappropriate development: Estuary contained a natural character - although not a pristine landscape it was predominantly 'natural'.
New Zealand Rail vs. Marlborough District Council (1993) RMA	**Shakespeare Bay Picton** Bay largely unmodified apart from a derelict freezing works.	**High Court** Appeal dismissed. Consent granted to build port facility.	Preservation of the natural character set aside because the proposed port was 'appropriate' at a national and regional level.
Minister of Conservation vs. Kapiti Coast District Council. (1994) RMA.	**Kapiti Coast Lower Western N.I.** Undeveloped coastal landscape with sand dunes an important component.	**Tribunal** Appeal upheld. Consent to develop land refused. ✓	Preservation of natural character is subordinate to the primary purpose of promoting sustainable management.
Fortzer & Ngawaka vs. Auckland Regional Council (1994) RMA	**Oneura Bay Great Barrier Island** "Pristine" coastal environment.	**Tribunal** Appeal upheld. Consent granted to operate a mussel farm.	Inappropriate development, which would disturb the dunes and compromise the natural character of an unmodified environment. Contrary to policies and rules.

Case	Coastal Environment	Court ruling (✓ = preservation granted)	Reason
J D Lowe and Another vs. Auckland Regional Council. (1994) RMA	**Port Abercrombie Great Barrier Island** Unmodified part of the coastal environment with minor development in the northern bays.	**Tribunal** Appeal declined. Consent to operate a mussel farm refused. ✓	Mussel farm already approved under previous legislation - although not currently operating. Natural character is "potentially" already compromised.
Mataka Station Ltd vs. The Far North District Council (1995) RMA	**Te Puna Inlet Bay of Islands** The lower sea faces of the ridges are covered in native bush while the upper parts of the ridges are covered in pasture	**Tribunal** On the basis of a revised condition about landscaping the development is considered appropriate.	Port Abercrombie predominantly retains its natural character, and the locality of the appellant's site retains its natural character fully.
Greensill & Ors vs. Waikato Regional Council (1995) RMA	**Paritata Bay Raglan Harbour** The land surrounding the Bay is largely pastoral and devoid of human structures.	**Tribunal**. Appeal allowed. Consent for pacific oyster farm refused. ✓	Tribunal stressed the importance of locating the papakainga development as close as possible to areas of cultural significance to the iwi.
Clyma vs. Otago Regional Council (1996) RMA	**Deborah Bay North of Port Chalmers** Catchment consisting largely of pasture, regenerating bush and scrub, some exotic plantation. Some built elements.	**Environment Court** Appeals upheld. Approval by the Council for coastal permits for a reclamation, jetties and pontoons cancelled. ✓	Cumulative effects were weighed against economic effects. Raglan Harbour is one of only two harbours on the west coast of the North Island that remain free from marine farming.
Reynolds vs. Kaipara District Council (1996)	**Matakohe, Northland** The site is in pasture and is clear of all but some derelict farming structures.	**Environment Court** Appeals disallowed. Consent granted by Council to build a camping ground upheld.	Proposal offends matters of national importance, namely the preservation of natural character, and the maintenance and enhancement of public access.

Case	Coastal Environment	Court ruling (✓ = preservation granted)	Reason
Trio Holdings vs. Marlborough District Council (1996) RMA	**Waitata Beach Marlborough Sounds** Steep land with regenerating bush cover. Two lots located below ridge line barely discernible from the sea.	**Environment Court** Appeal upheld. Approval for sponge culture allowed.	The site is sufficiently remote from the harbour, that the buildings would scarcely be visible from the harbour. It was further considered there would be minor impact on coastal environment. Sponge culture proposed for medical research was deemed to be a matter of international and national importance.
Brook Weatherwell-Johnson and Others vs. Tasman District Council (1996) RMA	**Motupipi Estuary, Takaka** Site characterised by low isolated hills. Vegetation consists of dense scrub, regenerating native bush, scattered pines.	**Environment Court** Appeal upheld. Application for a Plan change declined. ✓	The proposal would not preserve the natural character of the coastal environment. The development was not consistent with the provisions of the NZCPS.
Steffan John Browning vs. Marlborough District Council (1997) RMA	**Annie Bay, Marlborough Sounds** Site previously farmed, but now regenerating bush prevalent. Farm and road tracks present.	**Environment Court** Appeal upheld. Council's decision to allow spat holding facility cancelled. ✓	The proposal was considered inappropriate in terms of being located at a site that contained a high degree of natural character, and because of the strong land/water relationship. The current restoration of bush considered important in determining the "potential" naturalness of the site.
Director General of Conservation vs. the Marlborough District Council (1997) RMA	**Tawhitinui Bay, Marlborough Sounds** Small open bay. Land is steep and much is vested in scenic reserve. No houses, roads, or tracks.	**Environment Court** Appeal upheld and decision of council to allow mussel farms cancelled. ✓	Amongst other things, the proposal would affect vertical zonation patterns from the shoreline to the sea floor, which were currently intact and a key descriptor of natural character. This biotic pattern was distinct to the site, and represented an ecological continuum.

4 Practitioner Views on Natural Character

4.1 Introduction

Of relevance to this study is the expert evidence presented by practitioners regarding Section 6(a). Their views, which extend to the wider issues and theoretical debates underlying the interpretation of natural character have been, and are continuing, to be reflected in Environment Court decisions.

The information in this chapter derives primarily from prescribed questions that were sent to selected landscape architects, environmental planners, and ecologists for comment in November 1996[15]. Information has also been derived from internal correspondence within the Department of Conservation during the drafting of the New Zealand Coastal Policy Statement. While opinion encompassing natural character is not limited to the mix of disciplines chosen, the responses here are intended to give representative practitioner views of Section 6(a) issues.

4.2 Interpretation of Natural Character

4.2.1 What is Natural?

Although case law has assisted in defining natural character in terms of the New Zealand landscape, there still remains much debate and uncertainty over the term. This view is supported by Rackham (1996) who emphasises the point that 'natural' is not absolute. Moreover, *"the concept of natural character is fraught with complexities. Those responsible for implementing Section 6(a) will witness an evolving sophistication in practitioner's and the judiciary's understanding and interpretation of natural character" (*Rackham 1996).

The evolving interpretation of the term 'natural character' can be seen in the issues that underlay its introduction into New Zealand's planning regime. These issues, as highlighted in Chapter 1, related primarily to preserving the natural scenic qualities of New Zealand's coastal environment, and "the retention in sufficient quantity of the native coastal flora and fauna in its natural state" (Minister of Works and Development 1974). However, in reviewing practitioner responses, the phrase 'natural character' encompasses far broader issues than the protection of purely indigenous elements and the scenic qualities of the coast.

4.2.1.1 Assessing naturalness in terms of the New Zealand landscape

In applying the concept of 'naturalness' to Section 6(a) of the RMA (1991), Anstey (1993) is of the view that natural character is conferred on the coast by the indigenous elements and the processes that support them. Moreover,

[15] Practitioners which contributed to the discussion include:
Allan Rackham: Landscape Architect,
Diane Lucas: Landscape Planner,
Denis Nugent: Environmental Planner,
Ewen Henderson: Environmental Planner,
Geoff Park: Ecologist,
Rachel de Lambert: Landscape Architect,
Simon Smale: Landscape Architect,
Simon Swaffield: Landscape Architect.

indigenous elements contribute to the aesthetic qualities of the coast and in some places may have special historic and/or spiritual significance. Anstey (1993) stresses that it is the **indigenous** elements of the coastal environment that make it distinctly the New Zealand coast. Smale (1996) also stresses the importance of indigenous elements in terms of the New Zealand coastal environment, stating that *"our priorities are with the original, the indigenous, and particularly with those elements of primeval New Zealand that have been marginalised by the adverse impacts of our comparatively recent human settlement".*

The Department of Conservation's publication *Land Evaluation for Conservation* (1990) interprets 'naturalness' as "a state in ecosystems characterised by the lack of human disturbance and intervention". Furthermore, to determine what is 'natural' requires an understanding of ecosystem history and ecological processes. The publication refers to McGlone's reconstruction of 'natural' New Zealand (i.e. pre-human, and lacking introduced plants and animals), and takes this pre-Polynesian datum as generally the appropriate basis for assessing the naturalness (and representativeness) of New Zealand's ecosystem.

Ecologist, Geoff Park (1996) outlines two approaches to defining 'natural' in terms of Section 6(a).

1 Absolute Definition
The application of the 'absolute' definition incorporates only the **original/indigenous** elements contained within the environment. This interpretation is more in line with Section 3B of the Reserves Act, which is concerned with plants in their original state.

2 Multiple Component Definition
The Multiple Component definition looks at an environment within its **perceived** natural state, thus taking into account natural biological levels and competing processes. This definition accommodates the absolute definition but allows for incorporation of other components. The basis for the multiple component definition can be described using the following example. If a species (any species) is breeding, disposing, expanding its niche, competing with others etc. then that is nature. That particular species is giving expression to the natural character of the environment within which it has located itself.

In applying both definitions to the interpretation of natural character under Section 6(a) of the RMA, Park (1996) is of the view that both approaches relate to New Zealand's natural environment in its primeval state. However, the sense of primeval land in New Zealand is a myth. It is no longer possible to draw a boundary line around what is indigenous and what is introduced. The natural character of an environment needs to be assessed in terms of multi-components, rather than the absolute pristine environment. In other words, nature should be assessed as relational as opposed to absolute.

This interpretation is also supported within the RMA's definition of "**natural** and physical resources", which includes the non-native (Park 1996).

4.2.1.2 Naturalness assessed in terms of a spectrum

A common view shared by practitioners is that the degree to which the character of an environment is natural varies across a spectrum. At one end of the spectrum is the indigenous and pristine and at the other end the built-up urban environment. The significance of natural character in any particular decision will depend upon where the proposal is located on this spectrum.

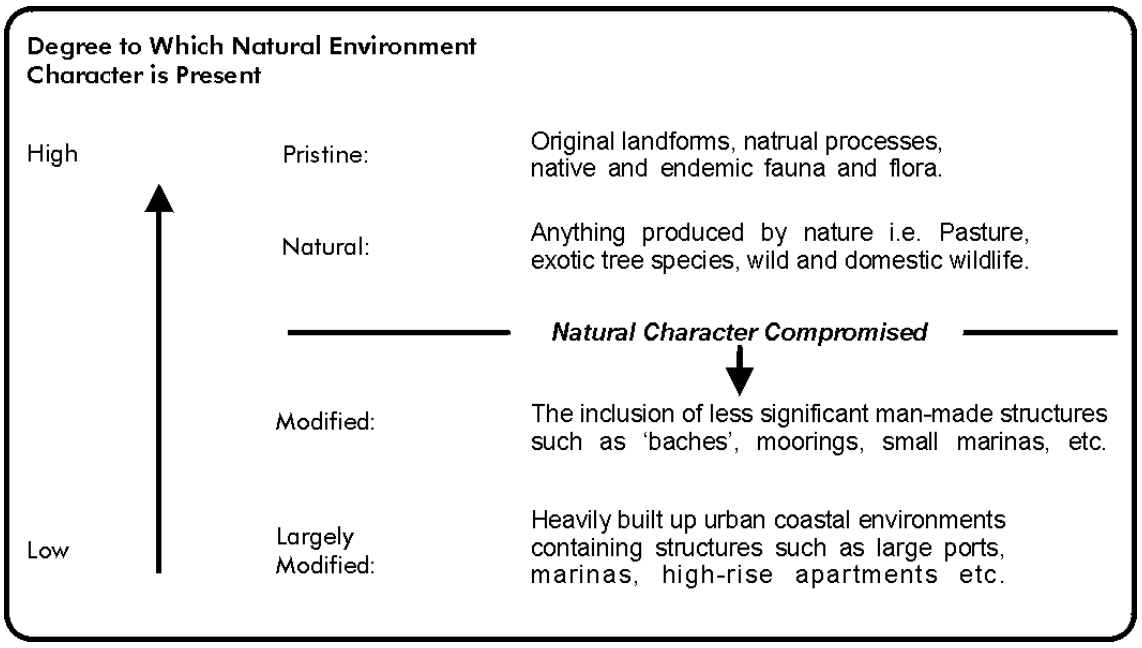

Figure 1: Degree to Which Natural Character is Present (Maplesden 1995)

Lucas (1996) comments about natural character in the context of a continuum from pristine to modified/compromised environments as follows:

> *"There are different types of compromise, some have greater perceived effect, others have greater ecological effect. Therefore natural character is assessed in terms of:*
>
> - *ecology, the viable functioning of natural processes; and,*
> - *experience, the attributes of "naturalness"*
>
> *Greater natural character is present where nature has greater ecological and experiential integrity".*

Smale (1996) provides a useful analogy that can be applied to assessing naturalness in terms of a spectrum. He states:

> *"The sun still shines and the tide rises and falls at the Port of Auckland - it retains some degree of natural character. However, Section 6(a) is unlikely to be of critical concern. Elsewhere across the spectrum, there is a need to maintain the integrity (unity, completeness and value) of indigenous ecosystems where they remain as spatially intact 'patches' within culturally modified landscapes".*

Farrow (1997) highlights a second "sub-spectrum" that exists within Figure 1 relating to **context**. According to Farrow (1997) context is of vital importance when relative naturalness and associated values are considered. Many of our cities are coastal, and some are subject to mounting urban pressure. Intensification of urban form consumes relic open spaces that are not protected as part of a formal reserve system. Correspondingly, the urban dweller has less choice in places to locally escape from their increasingly constructed surroundings to settings where nature predominates. The coastal margin frequently remains as one of those places where this can happen.

To conclude, Rackham (1996) states that the threshold at which the level of human intervention will cross from a 'natural' to a 'cultural' process will remain an area of debate and one that is likely to have its own spatial and temporal dynamic. Rackham provides the following example:

"In an urbanised society, landscapes that contain high levels of human intervention are more likely to be perceived as 'natural' than in a less developed environment. As the world becomes more urbanised our view of nature is likely to become less and less purist."

4.2.2 Nature and Culture - Theoretical Debate

An area of debate amongst practitioners, academics, and others is the inclusion/exclusion of cultural elements in the definition of 'natural character'. The judicial interpretation of 'natural' in terms of Section 6(a) excludes cultural elements (see Chapter 3). This interpretation was made particularly apparent in the Tribunal case, *Harrison vs.. Tasman District Council (1993)* which defines 'natural' as a word indicating *"a product of nature and can include such things as pasture, exotic tree species (pine), wildlife both wild and domestic and may other things of that ilk as opposed to man-made structures, roads, machinery, etc."*

Smale (1994) endorses the distinction between nature and culture in interpreting natural character, referring to this concept as the 'common sense' approach. However, Swaffield (1996:1) argues from a "constructivist" position in stating:

"because we can only ever observe and describe nature in human terms (i.e. we cannot escape from our 'humanness'), then the very concept of nature, and the qualities we ascribe to it, must inevitably be culturally constructed".

Having introduced both arguments, the common sense and constructivist position are outlined below in more detail.

4.2.2.1 Nature as a cultural construct

Swaffield (1996:1) believes that seeking to provide distinction between 'natural' and 'human' processes is highly problematic. He argues that all the products of nature defined in *Harrison vs. Tasman District Council*, could equally be regarded as 'cultural' on the basis that:

"pasture is constructed by human seeding and fertilisation, exotic timber trees are constructed through genetic cloning while animals are selectively bred. In contrast, a wall built of locally sourced stone appears to be regarded judicially as 'cultural'".

Swaffield (1996:1) points out that a collection of genes imported by humans from another part of the globe is rated as 'more natural' than a collection of minerals originating in the environment being assessed, but rearranged by humans (into a wall for example).

Swaffield (1998) comments that because we can only ever know nature within a cultural frame, then any concept of natural character within the legislation must first be culturally defined. It must be decided what dimensions of 'nature' are the important components of natural character (i.e. form, process, pattern), and what priorities should be assigned. This choice cannot be determined objectively, these decisions are politically and socially bound.

Swaffield (1996:1) emphasises that while phenomena we currently describe as nature do, in all probability exist independent of humans, we can only ever name them and know them in human (i.e. cultural) terms.

4.2.2.2 Common sense distinction

Smale (1994) argues for the 'common sense' distinction in terms of the RMA:

"There is a need to make a clear distinction between nature and culture in order to facilitate the balancing and integration of these aspects for the purpose of achieving sustainable management of natural and physical resources".

"Natural character under Section 6(a) seeks to preserve purely elements concerned with 'nature' (as distinct from culture). Certainly there does not seem to be any argument that Sections 6(b) and 6(c) address natural rather than cultural issues. Sections 6(a), 6(b) and 6(c) can therefore be viewed as a suite addressing key elements of the 'nature' side of the balance".

This view, according to Smale (1994), can be further supported by dictionary definitions. The first definition of 'natural' in the Collins Dictionary is *"of existing in, or produced by nature".* A key definition in the Concise Oxford Dictionary is "established by nature". 'Character' is defined by Collins as *"the combination of traits and qualities distinguishing the individual nature or a person or thing"* and by the Concise Oxford as *"collective peculiarities, sort, style".*

Smale (1994) comments that "it is fair to assume that the intent of the legislators was to use the word 'natural' as it relates to nature, rather than to the quite different meaning 'as is normal or to be expected'. It is a logical step to then interpret 'natural character' as *'the combination of natural traits and qualities distinguishing the individual nature of a ...thing'"*

Smale (1994) also comments about the opinion that 'character' is a cultural concept, and that a definition of 'natural character' which excludes cultural phenomena and/or values is therefore not possible. On the contrary, given the Collins definition of 'character' above, Smale would argue that character lends itself to *"precise and objective recognition, analysis and definition, whether it be natural or cultural character".*

Contrary to Smale's contention that 'natural character' can be described 'objectively', Swaffield (1996) finds from his reading of the literature so far that any such description will inevitably involve implicit conceptual distinctions and value judgement. His problem with a 'common sense' approach, and this is precisely the point of the 'constructivist' critics, is that it disguises or 'naturalises' the way such decisions are grounded in particular social, political, and economic circumstances.

Rackham (1996) also has difficulty with Simon Smale's view that "character lends itself to precise and objective recognition, analysis and definition..." He states that this is only possible once certain debatable ground rules have been accepted.

4.2.3 Nature and Culture - Practitioner Views

The interpretation of natural character provided by Environmental Planner, Denis Nugent (1996) supports the common sense distinction. Nugent (1996) defines natural character in an environment as:

"the degree to which the environment is controlled by natural forces, as opposed to human intervention. While clearly pristine forest has natural character, so does pasture. The growth of pasture, and the feeding of it by stock, is essentially a natural control. Even forests, in my opinion, have a degree of natural character. They grow through the forces of nature. However the harvesting of forests can be disruptive on natural character".

Moreover, Nugent (1996) further comments:

"the use of the term 'natural' is chosen to distinguish those things derived from and controlled by nature from the human controlled or manicured environment. That a landform is derived from some past society's alteration to the environment does

not, in itself, imbue that environment with natural character. On the other hand, it may not deprive the environment of natural character either, if natural processes have overtaken the earlier human intervention".

De Lambert's (1996) interpretation also supports the common sense distinction. She states:

"In the spectrum from pristine (if it exists) to the totally built, the degree of natural character relates to the degree to which what is there is derived from nature and natural processes. Even the most developed situation, e.g. a port - natural character does exist in the ebb and flow of the tide, the plant and mollusc, invertebrate etc communities which form etc but in the context of a primarily built and cultural environment".

Henderson's (1997) interpretation of natural character encompasses both natural and cultural elements. He notes that the Act uses the term 'natural' character and not 'pristine' character. *"Were it the latter then any subsequent cultural change (including Maori occupation and vegetation) would have to be unacceptable".* Henderson (1997) therefore takes the position that the use of the term 'natural' is intended to accommodate cultural change or cultural intervention.

Henderson (1997) distinguishes between 'inanimate' and 'animate' matter in stating:

"That which is organic (is alive or 'animate') is derived from nature and is encompassed by the term natural character. That which is dead ('inanimate') irrespective of its origins, e.g fences, roads, buildings, are imposed onto or into the natural character. The degree to which this imposition is acceptable depends on the degree of importance of the natural character (including cultural modification) on the one hand and the degree of modification (change) sought on the other".

4.2.4 Components of Natural Character

The following Section outlines some of the key components considered by practitioners as fundamental constituents of natural character.

4.2.4.1 Geology, Landform, vegetation

Smale (1994) describes geology, landform, and vegetation as the primary components of natural character. He further asserts:

"Major cultural modification of any of these components obviously detracts from it. Introduction of wholly cultural elements such as buildings and engineering structures also moves the balance towards a predominance of cultural character. Unmodified, original, indigenous landscapes clearly have a very high degree of natural character".

De Lambert (1996) states that in landscape evaluation, practitioners often describe: landform, landcover, and landuse. The degree of modification of the former by the latter essentially affects the degree of natural character.

4.2.4.2 Elements, processes, and patterns

The consideration of natural elements, patterns, and ecological processes as key components in determining degrees of natural character is highlighted by Smale (1994), Rackham (1996), Lucas (1996), de Lambert (1996).

In referring to the importance of natural elements and processes, Smale (1994) provides the following summary:

"Natural character derives not only from the contribution of natural elements but also from the extent to which landscape character is an expression of natural processes rather than cultural manipulations. We can compare a landscape that has been historically cleared of its original vegetation cover, and then left to regenerate, with a similarly cleared landscape that is subsequently maintained by grazing under a cover of introduced pasture. As an expression of natural processes, the regenerating landscape has a higher degree of natural character than does the grazed landscape, which by contrast is more an expression of cultural manipulation.

Thus the preservation of natural character requires the maintenance of:

1 The viable functioning of natural processes and systems (i.e. ecological attributes).
2 The visual attributes of 'naturalness'.

The significance of (1) needs stressing in that it is the processes which underlie the visible manifestation that we refer to as 'natural character', and therefore must be maintained".

The diagram on the following page, extracted by Smale (1996) from the landscape ecology text Changing Landscapes: An Ecological Perspective, refers to both processes and appearance. The disruption of natural processes by phenomena threatens the survival of most marginalised species and ecosystems. So, while we tend to focus on appearances, the preservation of natural character must firstly be concerned with sustaining the processes that underlie visual expression.

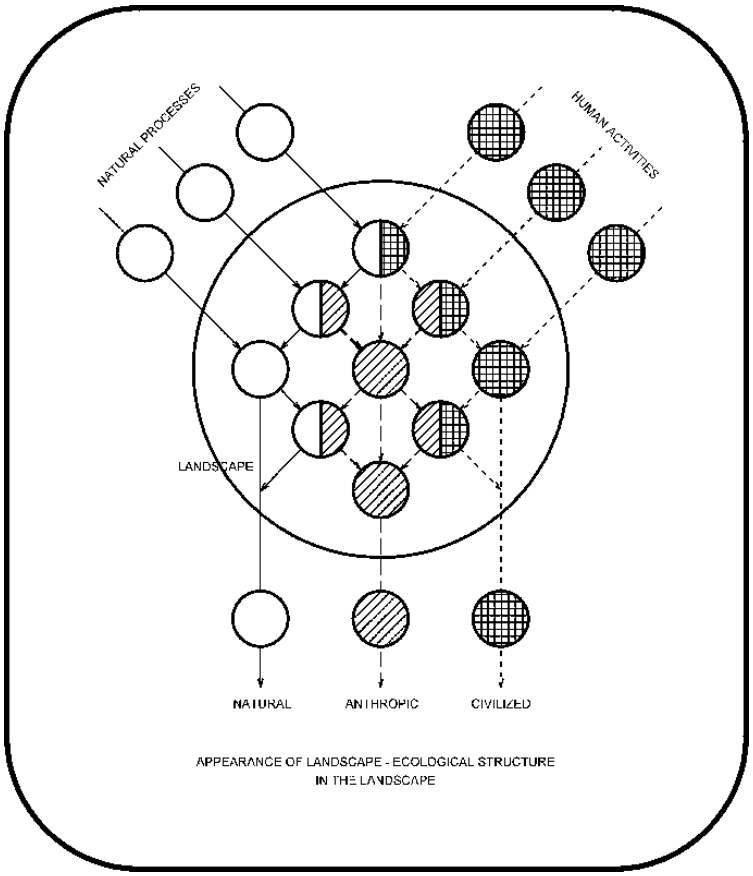

Figure 2: Relationship of Ecological Processes and Appearance of Landscape

Natural elements and patterns

In identifying the significance of natural elements when considering natural character, Rackham (1996) identifies the following issues:

> *"Clearly manufactured items such as concrete tilt slab buildings, steel towers and so on are not natural, whereas Kauri forest or flax swamp is. Also it appears from the case law that a cow and a Pinus radiata plantation are natural. In an ecological sense both are products of human intervention as much as, or more than, a dry rock wall. Does a topiary of introduced plants have natural character because it is composed of natural elements?"*

In Rackham's opinion there has to be an added consideration beyond the mere presence of unmanufactured elements. This accounts for the introduction of natural patterns in Rackham's definition. Natural patterns pick up on the natural expression or distribution of unmanufactured elements and is, as it were, a quality that must be met by natural elements, if they are to have 'natural character'.

To conclude this discussion, Rackham's interpretation of natural character in terms of ecological processes, patterns, and elements is outlined below:

> *"Natural character reflects the disposition of natural elements in dominantly natural patterns. It is natural processes that have resulted in these patterns and elements, and it is the continuation of natural processes that will secure natural character in the future. If the above logic is robust then natural character, in the context of sustainability, is dependent on the presence of natural elements, arranged in natural patterns and underpinned by natural processes".*

4.2.4.3 Natural science, ecosystem, potential vegetation cover, values

Lucas (1996) provides a brief summary of the fundamental considerations in addressing natural character:

> *"there is a need to address natural character beyond a biological assessment of the land-water interface areas and a visual assessment of the existing, evident, physical landscape and seascape. Inclusion of recognition of ecosystem process is appropriate including their restoration potential. People's relationship with these places also needs to be addressed. Recognition of natural therefore needs to embrace:*
>
> - *natural science values, and their sustainability and legibility*
> - *ecosystems, not just waterside bits and visible front faces*
> - *potential vegetation cover, not merely the existing; and*
> - *values attached to natural places and features".*

4.2.4.4 Visual, ecological, and heritage values

The key natural character components considered important by Henderson (1997) are described below:

> *"natural character is a combination of outstanding visual values, areas of outstanding ecological value and areas of heritage importance. The natural character encompasses cultural change, through Maori occupation, farm buildings, a road, and grazed pasture".*

Henderson (1997) states that the relative importance of the natural character is derived from a **combination** of landscape assessment (visual - including landform), an ecological assessment and often a cultural assessment, all utilising commonly acceptable assessment practices.

4.2.4.5 Natural character defined in terms of the RMA (1991)

An ecologist's perspective of natural character is provided by Park (1996) who defines the phrase in the context of definitions contained in Section 2 of the RMA.

Park (1996) suggests that there is a need to break down the key words interpreted in Section 2 of the Act when interpreting natural character in relation to the RMA (1991). This in turn can be applied to Section 6(a). Some of these key words include:

- natural and physical resources
- environment
- ecosystems
- intrinsic.

Park (1996) notes that the interpretation of word 'environment' in the RMA is dynamic in that it does not state a perceived view. Moreover, because the definition of environment includes "ecosystems and their constituent parts", it is appropriate to turn to the definition of "intrinsic values" of ecosystems. This interpretation, in terms of Section 2 of the Act, encompasses:

- integrity
- form
- functioning
- resilience.

The difficulty in referring to the definition of 'natural and physical resources' in the RMA to aid in the interpretation of 'natural character' is highlighted by Lucas (1996). She comments that "natural and physical resources, linked together in the purpose of the Act, is defined to include structures". The inclusion of structures in the interpretation of natural character is contrary to case law and a large proportion of practitioner views.

4.2.4.6 Aesthetics

Swaffield (1996) is of the view that natural character is a largely cultural concept and hence heavily influenced by **aesthetics**. In describing the influence of aesthetics on natural character, Swaffield (1996) states:

> *"Much of our understanding of landscape aesthetics is informed by 18th and 19th century ideals such as the picturesque, which continue to underpin both popular and professional values to this day. One such feature that 'scenic' aesthetic values share, is a tendency to highlight some aspects of nature, and to downplay and overlook others. In particular they focus on appearance, rather than the underlying process".*
>
> *"In the past decades, an alternative basis for aesthetic appreciation of nature has emerged. This alternative relates to the idea of an* ***ecological*** *aesthetic in which we seek the value expressions of natural processes of ecosystem health, landscape heterogeneity, and the particularity of place".*

Reference back to Chapter 1 certainly supports the notion that degradation of the "scenic" values of the coast prompted the enactment of Section 2(b) of the Town and Country Planning Act (1953). The importance of ecological components did not become apparent until the mid 1980s.

Swaffield (1996) further comments that:

> *"Whilst acknowledging that an understanding of natural processes is always conditional and evolving, there is a mismatch between the inherited aesthetics of the picturesque and the pastoral, and the emerging ecological aesthetic. Put*

simply, ecology is more 'messy' than a pastoral ideal, and less ordered and predictable than the picturesque".

In referring to the judicial interpretation of natural character in the case *Harrison vs. Tasman District Council, Swaffield (1996)* is of the view that *"treatment of pine, deer, and grass as 'natural' reflects the unconscious expression of a pastoral aesthetic: nature is bountiful, and that which is biologically productive is therefore more natural".*

To exemplify this point Swaffield (1996) points out that a carefully designed, self contained seasonal bach may have far less long term impact upon the ecological processes of the area than the apparently benign field of grass.

4.3 Natural Character Never Ceases to Become an Issue of Concern

"The conversion of landforms by humans often goes unnoticed. Moreover, humans tend to remain satisfied with an environment even as it degrades around them. As time passes, natural landscapes become even more susceptible to conversion, human memory of natural landform characteristics fade, documentation of those characteristics becomes scarcer, and people accept current conditions as a natural system. The landscape may remain valuable to humans, but the interactions of processes and the resultant landforms that characterised the natural system are modified, and the intrinsic value of the physical landscape is gradually lost" (Dr Karl Nordstrom[16] 1990, The concept of intrinsic value and depositional coastal landforms).

It can be argued, from reading this excerpt, that natural character should never cease to become an issue of concern, irrespective of whether the environment has already been influenced by human structures. The information presented below is a brief summary of practitioner's views on when, and if, natural character ceases to become an issue of concern.

Rennie (1993) is of the view that natural character definitely exists on all sites to some degree. In determining the degree of natural character present in a particular location, Rennie (1993) offers the following opinions:

"I think however that we can make a reasonably definitive statement for each place about the degree to which it exists, and that we can clearly define natural character for ready application".

"The same definition of natural character should apply throughout the country if we are to adopt consistent positions which are defensible in the courts. Even areas dominated by port facilities or houses have some degree of natural character - the sun still shines, the wind blows, the tide rises and falls etc".

Lucas (1996) holds the view that natural character ceases to exist when there is no evidence of natural elements, natural patterns, or natural processes. The strength of the evidence according to Lucas (1996), will relate to the *"naturalness of the context in terms of both ecology and experience - even when an area has been completely built upon so that the only evidence of nature is from the underlying landform".*

Lucas (1996) further states:

"The evidence of natural character is more pronounced when modifications have a complementary, rather than a conflicting character. That is, modification related to

[16] Dr Nordstrom is an associate research professor at the Centre for Coastal and Environmental Studies and a member of the geography department at Rutgers University, New Brunswick, New Jersey.

what is natural. Naturalistic modifications, even when involving built development, can heighten the experience of natural character".

Rackham (1996) also holds the view that natural elements, patterns and processes must be present to some degree if an area is to have 'natural character'. In determining the degree to which natural character is present in an environment, Rackham (1996) makes the following comments:

"There must be a clear predominance of natural elements. Artificial elements should contribute very little to the scene. If they do occur then they would be distributed in natural patterns. For example, natural character may occur despite the presence of a wall built from locally occurring stone and following the natural contour. Natural pattern would be important when artificial elements are present. I have used the term 'natural aspect' to describe the natural appearance of a modified environment".

"Where only natural elements occur, the requirement for natural patterns may be somewhat reduced. For example, an 'artificial' edge separating an area of bush and pasture may not be so critical to 'natural character'. The presence of natural processes is significant when sustainability is an issue. While it is conceivable to think of situations where heavy human intervention will maintain 'natural' patterns and processes and hence natural character, in most instances sustainability is dependent upon functioning natural processes underpinning natural character".

Nugent (1996), offers the following opinion in respect to when natural character ceases to become an issue of concern in the coastal environment:

"The degree to which the modification of the coastal environment by human intervention has to occur before preservation of natural character ceases to become a concern is a matter of degree. There will always be a degree of natural control in the coastal environment. Tides, currents, waves and wind are significant contributors to natural character. It is likely that on land, rather than in the water, it will be easier to establish that human activity has progressed to such a stage that natural character does not exist to such an extent that its preservation is necessary. In marine areas, components of the environment modified by human intervention may determine the extent to which natural character needs to be preserved. Essentially, each circumstance needs to be assessed, rather than some blanket approach being adopted".

"The existence of human contributions to the environment does not in itself remove or destroy natural character. It is the degree to which the human contribution subjugates the natural contribution. Thus a shed on a hill, or fence-line, is likely to have little overall effect on the natural character of a bay or inlet. At the other end of the spectrum, full scale urban development with associated marine facilities may well preclude the existence of any natural character".

De Lambert (1996) holds the view that the issue of natural character has to be considered as a matter of national importance in any coastal environment. She further states:

"The fact that an environment is already heavily modified does not automatically mean a proposal will not affect the natural character. Obviously though, on the other hand, if an environment is already heavily modified it is easier to locate an appropriate development within that environment and hence what is appropriate development is modified by the existing context within which it is to be located"

Henderson (1997) shares this view in stating:

"Natural character in the coastal environment may always exist and may always be of concern".

To conclude, Smale (1996) comments that we are still being misled by arguments about whether or not rolling pastoral or afforested hill country landscapes have natural character. Smale's response is:

"Of course they do, but from what does it derive, what therefore are the natural character issues in such landscapes, and how important are these in comparison with natural character issues in less modified and more indigenous landscapes?"

4.4 Assessing Natural Character

Assessing degrees of natural character in coastal environments has important implications when determining the desired protection under Section 6(a) of the RMA. The subjective nature of natural character often leads to differing interpretations of the state of environment. Assessments may vary according to practitioner discipline, techniques used, and the desired outcomes of clients who engage practitioners as expert witnesses. These variations in assessments are often brought to light in evidence produced for Council hearings, the Environment Court, High Court, etc.

Outlined below are some of the key considerations practitioners take into account when seeking to assess a coastal environment in terms of Section 6(a) and other relevant policy documents and plans.

4.4.1 Context

A particularly important consideration in assessing the natural character of an environment is the context of the specific location/site within the wider environment. Lucas (1996) states:

"A location does not exist in isolation and therefore consideration of the context is relevant. In the wilds of Fiordland, a minor modification from the pristine may markedly lessen the comparative degree of natural character, whereas within Auckland, a pocket of native trees on a coastal cliff may exhibit a relatively high degree of natural character. The contrast between the pocket of nature and urban surrounds, as with the contrast between pristine Fiordland surrounds and a minimally modified area, heightens the awareness of the more natural. The contrast allows emphasis to the character of the more natural. Natural character is considered to be present for both".

The importance of context in assessing natural character is also expressed by Anstey (1992) who asserts the following useful view:

"The definition of natural character will apply everywhere. What will vary is its significance according to the context. The reason that a case by case determination was envisioned was to accommodate the diversity in contexts, not to accommodate different definitions".

Rackham (1996) also asserts that the level of modification, or extent of naturalness, is dependent on **scale** and **context**. Rackham (1996) uses the following analogy to illustrate this.

"A length of coastline may be largely modified but with pockets of unmodified coastline within. It may be argued that the coast is either predominantly modified or predominantly natural depending on the scale of the context that is considered. It is also likely that a partially modified area in a very modified environment may be

considered to have natural character, whereas an identical landscape surrounded by pristine environments may be seen as lacking natural character".

4.4.2 Potential Naturalness

The significance of **potential** vegetation cover, and not merely the existing, is stressed by Lucas (1996). The notion of **"potential naturalness"** is also stressed in the Department of Conservation's publication *Land Evaluation for Conservation*. This states that the capability or potential of a partially modified environment to return to a natural condition may be useful criterion in assessing naturalness in partially modified natural environments. Potential naturalness needs to be understood in terms of the concept of succession, the relevant successional processes and the availability of regeneration sources (Margules and Usher, 1984; Overmars & O'Connor, 1983, cited in Department of Conservation 1990).

4.4.3 Landform, Landcover, Landuse Approach

In seeking to identify where a particular area sits in the spectrum (pristine to modified), de Lambert (1996) uses an objective analysis approach involving descriptors of landform - landcover - landuse. A typical application of this approach is shown below.

Landform
- unmodified
- modified
- degree of modification

Vegetation
- indigenous growth
- indigenous regrowth
- regenerating
- shrublands
- exotic/native mix
- pasture
- planted

Landuse
- conservation
- farming
- forestry
- settlement
- urban
- industrial
- marine farming
- combinations thereof.

According to de Lambert (1996):

> *"this pragmatic approach comes back to providing some objective analysis of the **specific location** and its **context** in order to determine how **appropriate** a specific development might be. The elements of the proposal can then be related to the elements of the existing environment to determine how good the "fit" is and therefore how appropriate a development might be".*

4.4.4 Natural, Naturalness and Naturalistic Approach

A method adopted by Lucas (1996) in assessing the degree of natural character present in the coastal environment is to distinguish between 'natural', 'naturalness', and 'naturalistic'. Lucas (1996) cites the following application of these criteria:

"'Natural' is of nature; 'naturalness' is the expression of the natural; 'naturalistic' is contrived to exhibit characteristics of nature - that is, it is of the cultural but expressing a relationship with the natural. Naturalistic elements/patterns/ processes are built to have a character that has a relationship with nature".

"Naturalistic character cannot substitute for natural character. To change an unbuilt place to a built place by introducing naturalistic elements - eg. a building of camouflage design character, or a design responding to natural visual characteristics such as form, colour, line and texture - no matter how successful the development is in mimicking or respecting nature, it still involves a reduction in natural character in replacing naturalness with naturalistic.

If able to be experienced or known to disrupt natural patterns or natural processes, the presence of introduced naturalistic elements reduces natural character by reducing the integrity of naturalness of the elements present. Even though these introduced elements may be very naturalistic in character, and some observers may be unaware of them as modifications, so that the character seems totally 'natural' to them, the 'naturalistic' generally has lesser natural character than the 'natural'. Both the ecology and experience need to be assessed for their natural vs. their naturalistic character and quality".

4.4.5 Role of the Public

The requirements for consultation and public involvement under the RMA 1991 reinforce the need to acknowledge the role of interpretation. This point is emphasised by Swaffield (1996):

"there are several contrasting approaches to the role of the public in landscape assessment. An 'expert' position typically regards landscape as objectively observable, its values are the composite of popular opinion, which require systematic survey and analysis".

However, while public opinion can be evaluated by objective methods, the results will primarily provide an insight into perceptions of what is natural. This again raises the 'nature/culture' debate about natural character and may well pose questions about amenity values with relation to natural character.

The potential for public opinion to be used as a factor in defining natural character has not yet been tested in the court and, so, is not discussed more fully in this report. However, approaches that have been and may be adopted to quantify this, warrants further investigation.

4.5 Problems Encountered in Assessing Natural Character

A brief synopsis of the problems encountered in assessing the natural character of the coastal environment was requested from the practitioners. The responses to the survey are outlined below.

From an environmental planner's perspective, Henderson (1997) provides the following comments:

"The major problem practitioners encounter in assessing the degree of natural character will always exist in an area strong in subjectivity. The difficulty is not at the extremes of the spectrum where general consensus may be established on what is poor development at one end and what is strong in natural character at the other. The difficulty comes between the extremes and varying degrees of design

competency can influence this. Despite many attempts, assessment can be systematic but can never be imperial. A high level of subjectivity will always exist. The effort to my mind should be placed on training for responsible design responses. This is the only pragmatic solution. Rules and design guidelines go only so far. We should not apologise for a high degree of subjectivity in either the assessments or the decisions but bring the requisite skills to bear. This will inevitably lead to few if any activities in the coastal environment which can be given "permitted activity" status".

One of the major problems expressed by Nugent (1996) in assessing natural character is the definition of the inland extent of the coastal environment. Nugent explains:

"While theoretically, reliance could be placed on a landscape assessment of the extent of coastal influences, in practice this leads to too narrow a definition. The important elements of determination of the inland extent must be:

- *the extent of land where development would have a significant influence on the character (natural or otherwise) of the coastal environment; and*
- *a reasonable alignment with property boundaries".*

To ensure that the matters in Section 6(a) are properly provided for, Nugent (1996) considers it better to define more land as coastal environment than too little. This is consistent with the precautionary approach.

Another major problem is expressed by Nugent (1996): at what point does human activity in the coastal marine area reach a point that further activity should be excluded to enable the preservation of the natural character of the coastal environment? He elaborates:

"The common law right of navigation means that any part of the coastal marine area can be navigated across and boats can drop anchor in any feasible location. Thus, there exists the possibility for some human activity everywhere. If boats regularly anchor in a given location, it is unreasonable to preclude the placing of a buoy there? This is the problem that often confronts applicants for mussel longlines. The practical solution has been to exclude mussel farms from specified locations because of the visual impact. However, the level of human intervention of the environment caused by a mussel farm is usually low, and little different from recreational craft mooring in the same location".

According to Nugent (1996), the wording of Policy 1.1.1 of the New Zealand Coastal Policy Statement may be problematic when determining whether natural character has been compromised.

Finally, de Lambert (1996) stresses the difficulty of establishing agreed levels of natural character because, as yet, there is no accepted national methodology or generally adopted approach. On the other hand, Anstey suggests that this may be limited by the diversity of contexts (see 4.3.1.)

4.6 Appropriate Subdivision, Use, and Development

This Section briefly summarises the views of leading practitioners on what constitutes appropriate subdivision, use, and development in the coastal environment.

4.6.1 Robustness of the Process and Form

A point raised by Nordstrom (1990) which can be related to the assessment of "appropriate" in terms of Section 6(a) is:- that the degree to which a natural feature is threatened by people relates to the **robustness** of the process and form of the feature. Nordstrom (1990) states:

"The degree to which the integrity of a natural feature is threatened by people relates to the robustness of the process and form and utility of the feature. Beaches and dunes are robust, but questions of human utility still place them at risk".

Using landforms as an example, Nordstrom (1990) states:

"these features cannot become "extinct" but they are a de facto non-renewable resource when conflicting uses supplant them in competition for space. They also lose their essential qualities when human alterations prevent them from completing their cycles. Landforms that retain their essential characteristics are required as well as landforms built or altered for human purposes. The former allow for human use based on tolerance of the natural system and are flexible in that they can accommodate changing subjective feelings".

Lucas (1997) comments too that because the context is often less than pristine, some natural characteristics require human intervention to maintain their robustness and integrity.

4.6.2 Continued Functioning of Ecosystems

In seeking to define what is "appropriate subdivision, use, and development", Park (1996) refers to "appropriate" subdivision as that which doesn't prohibit the natural character from continuing to function (i.e. the ecosystems). This is particularly applicable in assessing cumulative effects. For example, earthworks occurring well away from the coastal environment being assessed may impact on that environment in an "indirect" way (i.e. diverting a fresh water stream which feeds a salt marsh area). The fundamental question is: while the estuary may still look like an estuary, does it still function as one? Some of the effects associated with development may take years to fully impact on a particular coastal environment (in an ecological sense). Therefore, people who assess the effects of a particular activity on the coastal environment need to look at the **long term** effects - and to determine whether the activity is **sustainable**.

Park (1996) comments that 'character' in the New Zealand landscape must continue to function, and this is prevailed upon by the indigenous fauna and flora. However, preservation of natural character does not exclude those living (introduced) elements already present in built but highly cultured environments. Indigenous vegetation can co-exist with cultural elements, and can be mapped, planned, distinguished, and preserved. To summarise, appropriate use, development, and subdivision is that which preserves the **natural living state** of the environment.

4.6.3 "Fit" Between the Existing Environment and Characteristics of the Proposal

De Lambert (1996) interprets "appropriateness" as the fit between the existing environment and the characteristics of a proposal. Aspects that are considered important by de Lambert include:

- context
- existing character
- history of development of/in area
- scale of proposal
- elements of proposal
- benefits of proposal, i.e. natural character gains, remedying of existing degraded environments etc.

De Lambert (1996) also asserts that appropriateness has to be considered on a case-by-case basis.

4.6.4 Functional Need To Locate in the Coastal Environment

Nugent (1996) states that the "appropriateness" of some activities is defined by their functional need to locate within the coastal environment. That appropriateness according to Nugent (1996) is:

> *"Tempered by consideration of **location** and **effects** on the environment. For example, while a port is in a general sense appropriate use and development within the coastal environment, the appropriateness in any particular location must relate to the effects on the environment in that location.*
>
> *However, this functional need should not be the exclusive consideration. Other activities in appropriate locations may be appropriate uses. For example, a restaurant on the waterfront, or even over the water in downtown Auckland or Wellington may be an appropriate use and development, whereas the same activity in the Marlborough Sounds or Bay of Islands could be inappropriate. There are other activities, such as car parking within the CMA, which are inappropriate, even in downtown Auckland because they occupy space which would otherwise be available for appropriate activities, or they may cause additional development within the CMA to compensate for the space unavailable due to the car parking activity".*

Nugent (1996) further comments:

> *"On the land part of the coastal environment, the maintenance of the status quo is generally considered appropriate, except where that is creating adverse effects such as sedimentation. The conversion of pasture to residential can be appropriate if the density of the development is suited to the capacity of the environment to absorb it, and the built form does not overwhelm the naturalness of the coastal environment. This may require controls on landscaping or location of buildings".*

Nugent (1996) does not consider the planting of pasture with exotic trees to be inappropriate, but the harvesting could be if not carried out in a manner consistent with maintaining the natural character of the area.

4.6.5 Maintenance and Enhancement of Natural Patterns, Processes, and Elements

In considering both the ecology and experience of the natural character of the coast, Lucas (1996) holds the following view:

> *"appropriate change is that which would not significantly disrupt existing and/or potential natural elements, natural patterns, or natural processes".*

Furthermore, Lucas's (1996) interpretation of "appropriate subdivision, use and development" provides for the:

> *"**maintenance** or **enhancement** of natural patterns, processes and elements of the coast. That is, the change does not only visually "fit" or replicate nature, it actually enhances natural coastal ecology and coastal experience into the future".*

4.6.6 Sensitivity and Vulnerability of Landscape

- According to Smale (1996) the appropriateness of a proposed development first requires detailed identification of the **ecological** and **visual** attributes and **sensitivity** of the landscape. Consideration must be given to:

- "Whether any development can be accommodated. Is the proposal located within an outstanding natural feature or
- landscape, or other area of special value within the general matrix of the landscape such as an area of significant indigenous vegetation or significant habitat of indigenous fauna? If so what are the implications of this for development?
- How much development can be accommodated (**density/intensity** of development).
- How development should be located and arranged within the site **(site design)**.
- How individual structures and elements should be designed **(detail design)**".

Smale (1996) emphasises the opinion that the preservation of natural character clearly requires a 'design with nature' approach, where the intensity, arrangement and character of development is designed in response to the natural characteristics of the site.

- The *Canterbury Regional Landscape Study* prepared by Boffa Miskell and Lucas Associates (1993) refers to the ecological and aesthetic **vulnerability** of a particular natural feature or landscape in determining what development is inappropriate in terms of Section 6(a). The study addresses the issues of vulnerability and what is inappropriate in stating:

  "In assessing whether something is "inappropriate" it will thus be necessary to formulate the arguments in terms of the criteria and values that form the basis for ranking a particular natural feature or landscape as "outstanding". In addition to these criteria and values it will be necessary to take into account such matters as:

  1 *The ecological and aesthetic vulnerability of a particular natural feature or landscape.*
  2 *The scale and intensity of the proposed use or development; and*
  3 *The proposed design (which may enhance existing values or effectively mitigate any serious adverse effects).*

  An assessment of 'vulnerability' will be important in any discussion on whether proposed use or development of a natural feature or landscape is appropriate. In terms of landscape, vulnerability has generally been used in the context of "visual vulnerability" to provide an evaluation of a landscape's ability to accept change without diminishing the visual quality. This includes:

  a) *"Measure of the degree to which a given landscape is capable of absorbing man's impacts without significant modification of its positive visual qualities. High vulnerability indicates that natural conditions are easily disturbed, and that such disturbances would be highly visible in the event of development; low vulnerability conditions permit development to be absorbed with less evident alteration to the landscape".*

  b) *The susceptibility of an object or changed condition to critical evaluation as a consequence of its location in a position where it can be readily seen by the public. As applied to landscapes, it means their susceptibility to criticism (pro or con) as a consequence of their availability to public observation.*

  It is apparent from this explanation that vulnerability will be a key concept when predicting whether use and development will be inappropriate or not".

4.6.7 Coastal Environment Assessed in Terms of a Spectrum

Rackham (1997) adds a new dimension to the assessment of appropriateness through the location of the subdivision, use, or development and the relationship to the coast itself. In other words, a cross Section through the coastal environment will show a general reduction in the probable significance of a proposal as one progresses further inland. Consequently, within the coastal environment there are two spectrums operating. The first is the spectrum from pristine to heavily modified character, and the second is the spectrum from coastal dominance - i.e. within the coastal marine area or immediately adjacent, through to the inland boundary of the coastal environment, which may be kilometres from the coast.

> *"It would seem reasonable to assume that the less natural and the further from the coast a particular location within the coastal environment may be, the less likely it is that development will be inappropriate in terms of the adverse effects on the natural character. (It is of course, not simply a question of distance. It is more appropriate to think in terms of various levels of significance such as coastal dominance, coastal influence, and coastal hinterland." (Rackham 1997).*

4.7 Conclusion

This chapter has provided a range of practitioner viewpoints that seek to define aspects of Section 6(a) of the RMA.

An area of debate has been the extent to which natural character refers exclusively to New Zealand's indigenous natural environment, and the extent to which cultural elements (i.e human modifications) can be included. However, practitioners agree that natural character is best assessed in terms of a spectrum. At one end of the spectrum is the pristine, and at the other end the culturally dominated.

Some of the key components of natural character conveyed by practitioners in this chapter include: geology, landform, and vegetation (Smale 1994, de Lambert 1996); natural elements, processes and patterns (Rackham 1996, Lucas 1996, Smale 1994, de Lambert 1996); natural science values, ecosystems, potential vegetation cover, and values (Lucas 1996); intrinsic values (Park 1996); and aesthetic values (Swaffield 1996).

An important point stressed by the practitioners surveyed is that natural character never ceases to become an issue of concern because there is always some element of natural character, even in highly modified environments. Moreover, natural character should be considered a matter of national importance in any coastal environment - (de Lambert 1996).

Subjectivity in assessing the degree of natural character often leads to differing interpretations of the state of the environment. Some key considerations include: the wider context of a specific site or location; the potential naturalness (or ability of a site to 'recover' from modification); the use of landform, landcover and landuse descriptors to analyse where a site lies on the spectrum of pristine to modified environments; distinguishing between natural, naturalness and naturalistic; and values of 'natural' reflected by public opinion.

Finally, this chapter has outlined some practitioner views of what constitutes 'appropriate' subdivision, use, and development. Criteria outlined by practitioners include: the robustness of the process and form (Nordstrom 1990); the continued functioning of ecosystems (Park 1996); the fit between the existing environment and the characteristics of the proposal (de Lambert 1996); the functional need to locate in the coastal environment (Nugent 1996); the maintenance and enhancement of natural

patterns, processes and elements (Lucas 1996); and the sensitivity and vulnerability of the landscape (Smale 1994, Canterbury Regional Landscape Study 1993).

4.8 Chapter Summary

Practitioners' interpretation of natural character

An **absolute definition of 'natural'** includes only the indigenous or original elements and processes of the environment.

(Anstey, Smale, Park)

A broader definition of 'natural' includes the indigenous elements and processes but also includes other introduced components, provided that those components function in a biological system.

(Park)
(See case law for similar interpretation, 3.2.2.1, Chapter 3, Harrison vs. Tasman District Council 1993)

The degree to which the character of an environment is **natural varies across a spectrum**, from indigenous and pristine at one extreme to a highly modified environment at the other.

(Lucas, Smale, Farrow, Rackham)
(The Planning Tribunal made a similar distinction between dominant natural character and composite or modified character in Jessop vs. Marlborough District Council 1974, and J.D. Lowe and another vs. Auckland Regional Council 1994, See 3.2.2.1 and 3.2.2.4, Chapter 3)

There is debate about whether a distinction can be made between **natural and cultural elements**, with two main points of view:.

'Nature' is a cultural construct which humans define according to their own perceptions and cultural background; (Swaffield) or

"Nature' is a common sense distinction where things established by nature can be objectively identified.

(Smale, Nugent, De Lambert)
(This is essentially the approach adopted by the Planning Tribunal in Physical Environment Association of Coromandel (Inc) vs.. Thames Coromandel District Council 1982 and by the Environment Court in Brook Weatherwell-Johnson vs.. Tasman District Council 1996. See 3.2.2.1, Chapter 3))

Components of natural character include:

(see comparative case law in 3.2.2.2, Chapter 3)

- Geology, landform and vegetation
  (Gill and others vs. Rotorua District Council and Another 1993)
- Natural elements, processes, and patterns
  (Brook Weatherwell-Johnson vs. Tasman District Council 1996)
- Ecosystems, including potential vegetation cover
  (Gill and others vs. Rotorua District Council and Another 1993)
- Values attached to natural places and features
  (Steffan John Browning vs. Marlborough District Council 1997)
- A combination of landscape, ecological and cultural (heritage) factors
- Aesthetics associated with cultural perceptions of what is scenic or natural.

Natural character is a constant issue

Natural character **always exists to some degree**, even in a heavily modified environment, so will always be an issue to be considered in coastal environments.

(see 3.2.2.5, Chapter 3, Thomas RD and MD vs. Marlborough District Council 1995)

Assessing natural character

Factors and approaches to consider when **assessing natural character** include:

The significance of a site's natural character will vary according to the context of the surrounding environment.

(see 3.2.2.2, Chapter 3, Browning vs. Marlborough District Council 1997)

The **potential naturalness** of a site, based upon an understanding of natural processes such as vegetation succession.

(see 3.2.2.2, Chapter 3, Browning vs. Marlborough District Council 1997)

Analysis of landform, landcover and landuse to assist with assessing the level of modification and appropriateness of development.

Analysis of both the ecology and experience of the area in terms of **natural** (of nature) or **naturalistic** (mimicking nature) character and quality, where 'natural' is generally of higher natural character than 'naturalistic'.

The views and perceptions of the **public**.

Appropriate subdivision, use, and development

Factors which may, in combination, constitute **appropriate** subdivision, use and development include:

- If the natural elements are **robust** enough to retain the integrity of their process or form.
- If the related **ecosystems can continue to function** both in the short and long term. i.e. are sustainable.
- If the proposed development **'fits'** with the existing environment and **does not significantly disrupt** natural patterns, processes, or elements.
- If there is a **functional need** to locate within the coastal environment.
- If the proposal has been **designed with nature**.
- If the development can occur without unduly disturbing the **visual natural qualities** of the location.
- If the **coastal influence** on the site is comparatively slight when considered on a spectrum of dominant to insignificant coastal influence.

5 Natural Character - Key Conclusions

5.1 Evolution of the Phrase 'Natural Character'

The philosophical intent of the term 'natural character' has and is continuing to evolve. This evolution has taken effect through both the 1953 and 1977 Town and Country Planning Acts, coastal law reform of the 1980s, Resource Management Law Reform, the drafting of the New Zealand Coastal Policy Statement, and continues in the context of the Resource Management Act 1991.

A primary issue behind the promulgation of Section 2B of the Town and Country Planning Act 1953 was that the remote, scenic and unspoilt coastal areas in New Zealand were rapidly becoming a scarce resource. This is made apparent in early 1970s literature and Ministerial reports. A 1972 Ministerial report on coastal development qualifies this view in stating:

> *"the line taken in this report is that in most coastal areas appearance is important, particularly when the natural scenic quality of the land is high" (Ministry of Works & Development 1972).*

It is likely that the significance placed on preserving the amenity and scenic values of the coast lent impetus to the introduction of Section 2B of the Town and Country Planning Act 1953. These values are, according to Swaffield (1996) informed by 18th and 19th century ideals such as the picturesque. These ideals continue to underpin both popular and professional values in our understanding of landscape aesthetics to this day.

It was not until the early 1980s that ecological and intrinsic values were recognised as primary components of natural character. The focus on ecological values was prompted by the 'sustainability' paradigm that emerged during the resource management law reform process. Ecological values per se have been subject to growing emphasis under the Resource Management Act 1991. Both case law and practitioners continue to stress the importance of ecological processes in determining degrees of natural character.

The interpretation of natural character in terms of evolving case law has also been subject to marked changes in political environments, and different philosophies behind the relevant Acts. In terms of the Resource Management Act (1991) the courts have stressed that Section 6(a) as a 'principle' must promote the overall 'purpose' of the Act; the sustainable management of natural and physical resources. This interpretation is articulated in the NZ Rail vs. Marlborough District Council decision, which states:

> *"... the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose."*

5.2 Defining Natural Character

Defining 'Natural' in terms of the New Zealand Landscape

One of the national policies provided by the Ministry of Works and Development in 1973 was the "retention in sufficient quantity of the native coastal flora and fauna in its

natural state: as well as the unique and typical coastal scenery" (Ministry of Works and Development 1973). This suggests that emphasis was placed on the protection of indigenous/native fauna and flora.

However, as Park (1996) states, the presence of primeval land in New Zealand is a myth, as it is no longer possible to draw boundary lines around what is indigenous and what is not. A pragmatic method to defining naturalness, and one which is consistent with case law[17], is Park's (1996) "Multiple Component" approach. This approach defines naturalness in terms of Section 6(a) as encompassing both the indigenous/ native and introduced species.

Natural character assessed in terms of a spectrum

In defining degrees to which natural character is present within the coastal environment, it is useful to assess natural character in terms of a spectrum. At one end of the spectrum is the largely modified built environments and, at the other, the predominantly unmodified environments. This approach to assessing natural character is consistent with both practitioner views and case law.

An important point to emphasise, and one which has been fully supported through case law[18] and leading practitioner views, is that natural character is present to some degree in every coastal environment. Natural character, therefore, should be treated as a Matter of National Importance in every development situation. The fundamental point to consider in terms of Section 6(a) is that if an environment is heavily modified then it is easier to facilitate 'appropriate' subdivision, use, and development (de Lambert 1996).

Cultural components in terms of defining natural character

A significant debate underlying the interpretation of natural character is whether the clause includes cultural components. Swaffield (1996) argues that, because we can only ever observe and describe nature in human terms, it is difficult to separate nature from culture.

However, to successfully implement the Section 6(a) clause into New Zealand's planning regime, practical boundaries must be drawn. The 'common sense' approach, as referred to by Smale (1996), provides a marked distinction between natural and cultural elements. However, a problem does occur in defining the boundaries between nature and culture.

The pragmatic view adopted by the courts and the majority of practitioners is that natural character encompasses those elements that have been brought into being by nature and are, more importantly, subject to ecological processes.

It seems likely that this approach was the intent of the 'natural character' clause prior to its enactment into the 1953 TCPA. This view is supported by the Ministry of Works and Development (1972) report on coastal development, which states:

> *"As to the kind of landscape needed, the report makes the assumption that the natural landscape should be dominant, and that where this is not practicable the man-made landscape should make the most of natural features and vegetation".*

Case law further supports the view that natural character encompasses solely natural components. Reference is drawn to the case, Harrison vs. Tasman DC, which states:

> *"The word 'natural' is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife both wild and domestic and*

[17] Relevant case law decision is *Harrison vs. Tasman District Council (1993)* which refers to natural as *"a word indicating a product of nature and can include such things as pasture, exotic tree species (pine),.."*

[18] Relevant case law decision is Clyma vs. Otago Regional Council (1996).

many other things of that ilk as opposed to man-made structures, roads, machinery etc."

The separation of natural and cultural elements is also supported by the Board of Inquiry Report (1994), which defines "natural" in relation to the NZCPS as:

"..something which is created by nature as distinct from that which is constructed by man" (Physical Environment Assn. vs. Thames Coromandel District Council (1982).

Components of natural character

The primary components which underpin natural character in terms of Section 6(a) are natural processes, natural elements and natural patterns. This approach in defining natural character is supported through both case law[19] and other leading practitioner views. Natural processes, natural elements and natural patterns interrelate with one another to produce 'natural character' of varying degrees. The three components are briefly described below:

Natural processes

The preservation of natural character must first be concerned with sustaining the ecological processes which underlie the visual expression of an environment (Smale 1994).

Natural elements

Natural elements are the product of ecological processes. They may or may not be expressed visually. In terms of the coastal environment, natural elements may include geology, landforms, vegetation cover, seabed, foreshore etc.

Natural patterns

Natural patterns pick up on the natural expression or distribution of unmanufactured elements in an environment (Rackham 1996). The significance of natural patterns in terms of defining natural character can be described using the following analogy: Genetically cloned pine trees which have been planted in an ordered manner may be regarded equally or more 'unnatural' as a dry rock wall. Moreover, the visual effects associated with ordered forestry patterns will compromise the natural character of an environment to a greater degree than a discretely located bach. However, pine trees that have self-seeded as a result of natural processes may contribute positively to the natural character of an environment in that patterns have been maintained.

The interrelationship of natural processes, elements, and patterns is described by Rackham (1996):

"Natural character reflects the disposition of natural elements in dominantly natural patterns. It is natural processes that have resulted in those patterns and elements, and it is the continuation of natural processes that will secure natural character in the future. If the above logic is robust than natural character, in the context of sustainability, is dependent on the presence of natural elements, arranged in natural patterns and underpinned by natural processes."

[19] Relevant case law decision *is Brook Weatherwell-Johnson vs. Tasman DC (1996), Browning vs. Marlborough DC (1977).*

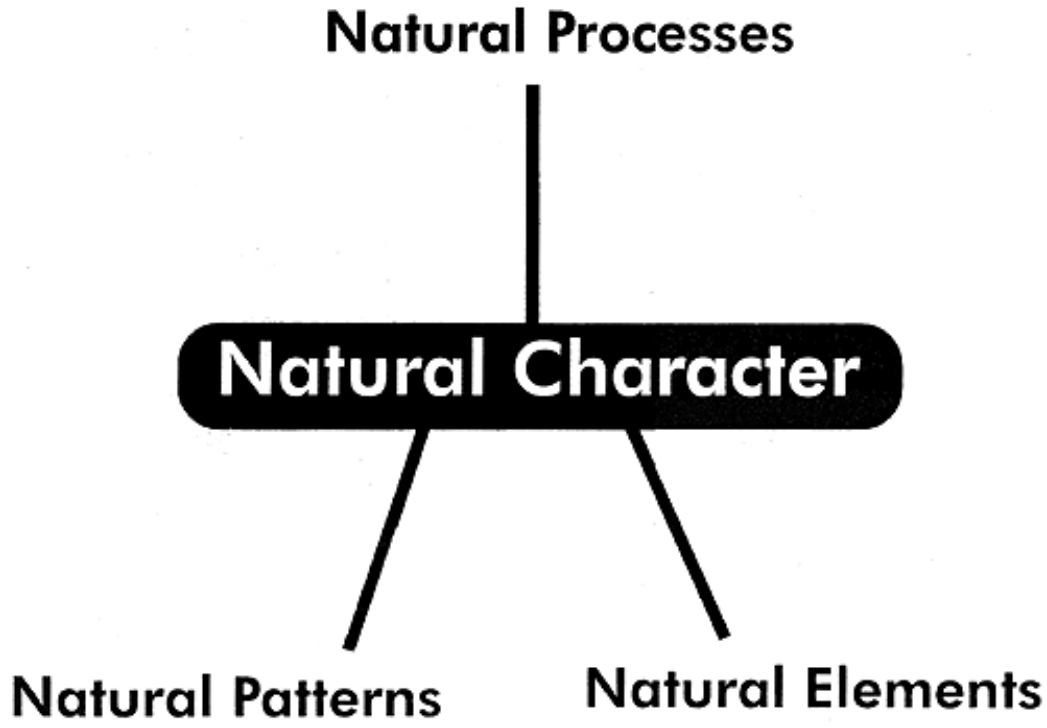

Figure 3: Components of Natural Character

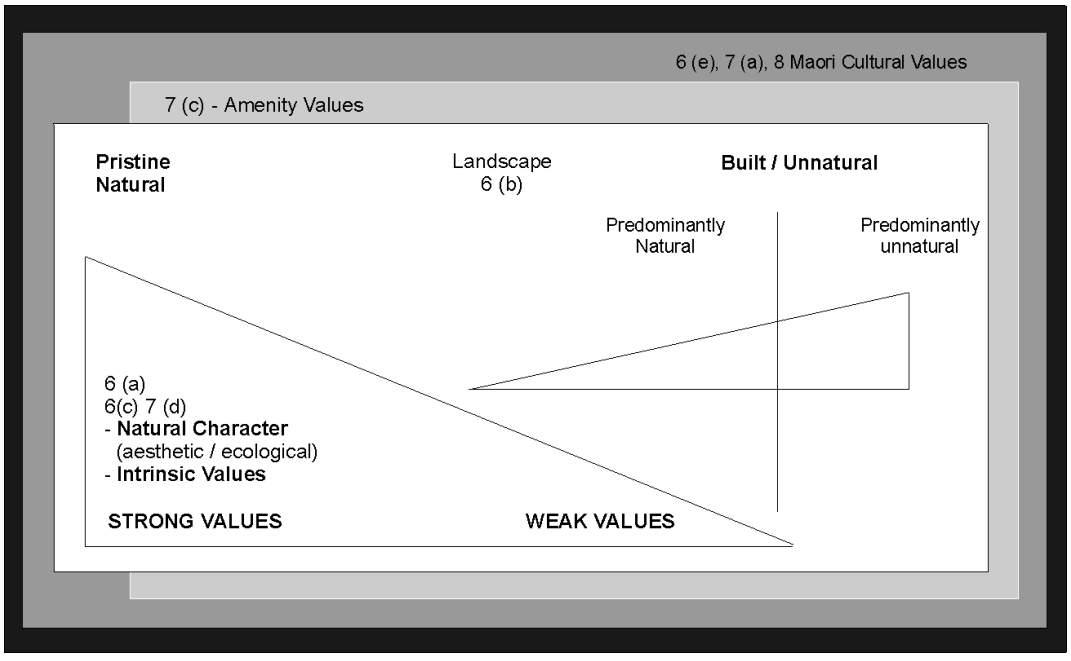

Figure 4: Diagram Showing the Relationship of Section 6(a) with Part II of the Resource Management Act (1991) (Boffa Miskell, 1997)

5.3 Preservation of Natural Character

Case law indicates that preservation of natural character in terms of Section 6(a) is most likely to be afforded in predominantly 'natural' environments that are largely free of built structures and modifications. However, it should not be assumed that development will always be 'appropriate' in modified coastal environments. In some situations, development may be 'inappropriate' if it will degrade a coastal environment further from its current modified state. The case law decision *Thomas vs. Marlborough District Council (1995)* in referring to Policy 1.1.1[20] of the NZCPS supports this notion in stating:

> *"That policy is not to be taken as a blank cheque for encouraging unlimited further development of the sort proposed in the present case simply because the environment has been significantly modified. It is still necessary to take into account the effects of such use or development on the values of what is left of the natural character of the coastal environment, both within the immediate area affected by the application and outside of it."*

Reference to the High Court case NZ Rail vs. Marlborough DC (1993) states the preservation of natural character is subordinate to the overall Purpose of the Act. However, the decision also stresses: *"the preservation of the natural character of the coastal environment is only to give way to suitable or fitting subdivision, use, and development."*

5.4 Assessing Natural Character

Two important considerations in assessing the degree to which natural character is present in a coastal environment is context and potential naturalness. These are outlined below:

Context
The consideration of context in assessing natural character is stressed by practitioners and in case law[21]. Lucas (1996) describes below the application of context:

> *"A location does not exist in isolation and therefore consideration of the context is relevant. In the wilds of Fiordland, a minor modification from the pristine may markedly lessen the comparative degree of natural character, whereas within Auckland, a pocket of native trees on a coastal cliff may exhibit a relatively high degree of natural character.*
>
> *The contrast between the pocket of nature and urban surrounds, as with the contrast between pristine Fiordland surrounds and a minimally modified area, heightens the awareness of the more natural. The contrast allows emphasis to the character of the more natural. Natural character is considered to be present for both."*

Potential naturalness
The significance of potential naturalness in assessing natural character has been advocated by Lucas (1996) and upheld in the case Browning vs. Marlborough District Council (1997). The ability of any environment to return to its 'natural' state can be judged in terms of a site's ecological resilience and natural restoration potential. This is an important concept because it recognises that ecological processes bring about

[20] Policy 1.1.1 (a) of the NZCPS (1994) states: "It is a national priority to preserve the natural character of the coastal environment by: encouraging appropriate subdivsion, use or development in areas where the natural character has already been compromised and avoiding sporadic subdivision, use or development in the coastal environment."

[21] Relevant case law includes: Brook Weather-Johnson vs. Tasman DC (1996), Browing vs. Marlborough DC (1997).

change and are likely to increase the degree of naturalness in a given environment. In the Browning case, the Environment Court perceived the natural character of the environment in terms of regenerating forest and ruled:

> *"The experiential recognition of what is natural character and a landscape worthy of protection goes not to the matter of tasteful subjective judgement but to a recognition that the dominant land patterns on the landform consist of scrub and regenerating forest uncluttered by buildings or jarring colours, and an unencumbered land/sea interface."*

Public opinion
Objectively surveyed public views about what constitutes natural character is a third potential factor. This is, as yet, untested in the Court but, given the emphasis in RMA on public consultation, is an area that merits further investigation.

5.5 Appropriate Subdivision, Use, and Development

The *New Zealand Rail* case provides guidance on what constitutes "appropriate" subdivision, use and development. Two fundamental rulings from this case included:

i. *the preservation of the natural character of the coastal environment is only to give way to suitable or fitting subdivision, use, and development.*

ii. *when considering appropriateness as distinct from need, it has to be remembered that it is appropriateness in a national context that is being considered.*

In referring to practitioner views, it is useful to determine 'appropriateness' in terms of the following aspects:

- continued functioning of ecosystems
- maintenance and enhancement of natural patterns, processes and elements
- sensitivity and vulnerability of the physical and experiential landscape.

Functional need is an important consideration for determining the appropriateness of some proposals. For example, a port may be considered an appropriate use and development within the coastal environment because of its functional need to locate there (see *NZ Rail* case).

Finally, another useful parameter for assessing appropriateness is identifying the "fit" between the existing environment and the characteristics of the proposal (de Lambert 1996). Aspects may include: context, existing character, the scale of the proposal and such like.

5.6 Natural Character - A Complex, Dynamic and Evolving Concept

This paper has shown that the term 'natural character' is a complex, dynamic, and evolving concept. There are some differences in the way practitioners and the judiciary interpret, analyse, and articulate the natural character issue. For example, case law defines natural character in a pragmatic sense that endorses a clear nature/culture split. Some argue that this split is problematic because nature is a cultural construct and we can only ever observe and describe nature in human terms. These differences aside there appears to be broad consensus on what natural character is about. That consensus, too, is consistent with the legislator's intent outlined in Chapters 1 and 2.

Appendix 1: Policies 1.1.1 - 1.1.5 Chapter 1 of "New Zealand Coastal Policy Statement"

"Chapter 1 - National Priorities For The Preservation of The Natural Character of The Coastal Environment Including Protection From Inappropriate Subdivision, Use And Development.

Policy 1.1.1

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; and

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

Policy 1.1.2

It is a national priority for the preservation of the natural character of the coastal environment to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in that environment by:

a) avoiding any actual or potential adverse affects of activities on the following areas or habitats:
   i) areas and habitats important to the continued survival of any indigenous species
   ii) areas containing nationally vulnerable species or nationally outstanding examples of indigenous community types

b) avoiding or remedying any actual or potential adverse effects of activities on the following areas:
   i) outstanding or rare indigenous community types within an ecological region or ecological district
   ii) habitat important to regionally endangered or nationally rare species and ecological corridors connecting such areas
   iii) areas important to migratory species, and to vulnerable stages of common indigenous species, in particular wetlands and estuaries

c) protecting ecosystems which are unique to the coastal environment and vulnerable to modification including estuaries, coastal wetlands, mangroves and dunes and their margins

d) recognising that any other areas of predominantly indigenous vegetation or habitats of significant indigenous fauna should be disturbed only to the extent reasonably necessary to carry out approved activities.

Policy 1.1.3

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
   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

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

Policy 1.1.4

It is a national priority for the preservation of natural character of the coastal environment to protect the integrity, functioning, and resilience of the coastal environment in terms of:

a) the dynamic processes and features arising from the natural movement of sediments, water and air
b) natural movement of biota
c) natural substrate composition
d) natural water and air quality
e) natural bio diversity, productivity and biotic patterns
f) intrinsic values of ecosystems.

Policy 1.1.5

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

List of Cases

- Batchelor vs. Tauranga District Council (1992) 1 NZRMA 266.
- Brook Weatherwell-Johnson and Others vs. Tasman District Council (1996), 2 NZED 63, Decision No. W181/96.
- Browning, Steffan vs. Marlborough District Council (1996), 2 NZED 179, Decision No. W20/97.
- Combined Estuary Association vs. Christchurch City Council (1988) 12 NZTPA 438.
- Clyma, Braid, Globe Export Fisheries Ltd, Todd, Weatherall, Deborah Bay Association Inc, Reid, Environment Access Inc, Petersen, vs. Otago Regional Council & Dunedin City Council (1996), 1 NZED 458, Decision No. W64/96.
- Director General of Conservation vs. Marlborough District Council (1997), 2 NZED 683, Decision No. W89/97.
- Di Andre Estates Limited vs. Rodney District Council (1996) 2 NZED 134, Decision No. W197/96.
- Environmental Defence Society vs. Mangonui County Council, Decision No. A3/86, 3 February 1986.
- Environmental Defence Society and Tai Tokerau District Maori Council vs. Mangonui Country Council (1987) 12 NZTPA 349 (HC).
- Environmental Defence Society and Tai Tokerau District Maori Council vs. Manonui County Council (1989) 3 NZLR 257; (1989) 13 NZTPA 197 (CA).
- Fortzer & Ngawaka vs. Auckland Regional Council (1994), NZRMA, 222/93.
- Furness Farms Ltd vs. Sunny Points Estates Ltd (1977), NZTCPA, 69/77.
- Gill Jo and H.J. and Others vs. Rotorua District Council (1993) 2 NZRMA 604.
- Greensill A.E.N. & Ors vs. Waikato Regional Council (1995) 4 NZPTD 241, Decision No. W017/95.
- Harrison vs. Tasman District Council (1993) NZRMA, Decision No 42/93.
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