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International best practice in Coastal Management: how does the Resource Management Act 1991 compare?

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1. INTRODUCTION

1.1 The coastal environment forms an essential part of New Zealander's national identity. In addition to the significant recreational, aesthetic and conservation benefits, the coastal environment also provides an ever important economic resource. Yet, as with other countries, New Zealand more than ever before is facing growing concerns over the continued degradation of its coastline in light of these competing demands.

1.2 Recent times have seen increasing pressure being placed on the use of New Zealand's coastal environment. As early as the 1970's, concerns were raised regarding the heightened demand to subdivide and develop New Zealand's coastal environment (see for example Judge Turner's article, *"Protecting the Coastal Environment"* available at http://www.eds.org.nz/landscape/opinion). Indeed it was these concerns which first prompted the inclusion of preservation of the natural character of the coastal environment from 'unnecessary subdivision and development' as a matter of national importance within the Town and Country Planning Amendment Act 1973 ("**TCPA**") - an amended version of which was eventually incorporated into s6 of the Resource Management Act 1991 ("**RMA**"). This pressure to subdivide and develop coastal land (particularly in the form of increased demand for coastal lifestyle blocks) continues today largely unabated (see Raewyn Peart, *"A Place to Stand: The protection of New Zealand's natural and cultural landscape"* Environment Defence Society Inc, Auckland, 2004).

1.3 More recently pressure on the coastal environment has come from other quarters. Technological changes have created an increasing area of coastline that is suitable for aquaculture, and as a consequence has increased the demand for marine farms. This burgeoning demand ultimately lead in 2002 to a moratorium on new marine farms being established, in an attempt to ensure that aquaculture in New Zealand's waters is managed in a sustainable manner - thereby allowing for an appropriate balance to be reached between recreational, environmental, customary and commercial interests. (see *"Aquaculture Moratorium: Stemming the Goldrush or Killing the Goose?"*, Chapman Tripp*,* 27 April 2002).

1.4 Yet these issues are not unique to New Zealand. As this paper will highlight, conflicting pressures on the use and development of the coastal environment are experienced in many countries in Europe and North America, as this commentary in relation to British Columbia illustrates:

> As many British Columbia coastal zone studies conducted over the years have noted, coastal land is subject to competing demands from a myriad of activities such as industrial use; aquaculture; tourism; transportation; resource extraction, and residential development. The laws that regulate these activities are not integrated, do not take an ecosystem approach and do not account for the cumulative impact of all the combined activities that take place in the coastal zone. The incremental loss of habitat will continue as long as the project specific approval and mitigation process proceeds. The decline in coastal and estuarine habitat is fuelled each time an individual permit is issued for a new

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> home, dock or marina; each time an authorization to damage or destroy fish habitat is made; and each time a lease for Crown land is approved. Each decision is made in isolation, without consideration for the cumulative impact of many individual small decisions.
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> …
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> A process of integrated coastal management (ICM) administered by the current provincial land managers, in conjunction with other regulators with responsibilities for this land such as wildlife and habitat managers at the Ministry of Environment and Land and Parks, Municipal Affairs, the federal Department of Fisheries and Oceans, local governments, the Islands Trust, and public representatives, would provide an improved regulatory framework for this land (*"Preserving British Columbia's Coast: A Regulatory Review"*, West Coast Environmental Law, 1999).

1.5 This paper undertakes a comparative analysis of coastal planning regimes in two countries, namely Ireland and British Columbia in Canada. They have been chosen largely because of their geographical similarities with New Zealand, however, it is acknowledged that effective management of coastal development has become a global issue.

1.6 An examination of these jurisdictions quickly reveals that by comparison New Zealand's coastal planning regime benefits from a more integrated approach to coastal management, although as will be highlighted later on in this paper there are a number of key areas where management of the coastal environment in New Zealand could be improved.

2. EXPERIENCES IN IRELAND AND BRITISH COLUMBIA - DEVELOPING AN INTEGRATED APPROACH TO COASTAL MANAGEMENT

Ireland

2.1 Like New Zealand, Ireland has an expansive coastline, spanning some 6500 km (5800 km in the Republic of Ireland). With an estimated 59% of the population living within 50 km of the coast, the coastal environment plays an important role socially and economically (A. O'Hagan and J. Cooper, "*Spatial variability in approaches to coastal protection in Ireland*, Journal of Coastal Research Special Issue 36, 2002, pp 544-551).

2.2 As with many other countries, Ireland (both Northern and the Republic of Ireland) faces ongoing degradation of its coastline, largely from a wave of new development. As noted by Jim Kitchen, Head of WWF Northern Ireland:

> The Northern Ireland coastline is in danger of being swamped by a tide of development. New marinas and the apartments that come in their wake, shellfish farming, uncontrolled recreational use, sewage pollution, sand removal - all of these and other threats are putting unprecedented pressures on our fragile coast from Derry to Dundrum (*"Just Coasting: An assessment of the commitment of the devolved administrations and the English regions to integrated Coastal Management"*, A Report from The Wildlife Trusts and WWF, November 2002).

2.3 Coastal protection is another significant issue affecting the coastline in Ireland. It is estimated that erosion causes a loss of between 160 and 300 hectares of coastal land area in Ireland each year (O'Hagan and Cooper, 2002).

2.4 A lack of integration in the management of the coastal environment is a key issue experienced in both Northern Ireland and the Republic of Ireland. In the Republic of Ireland ("**ROI**"), for example, coastal management still proceeds in a largely ad hoc manner and is the responsibility of a number of national and local institutions.

Consequently the Department of Marine and Natural Resources has responsibility for the majority of activities seaward of mean high water, dealing with issues such as aquaculture, coastal zone administration and maritime safety. The Department of Environment and Local Government in contrast is primarily concerned with activities landward of mean high water, with local authorities acting as the implementation bodies for this department. Finally the Department for Arts, Heritage, Gaeltacht and the Islands has responsibility for nature conservation, for example by designating special areas of conservation. This has lead to situation of uncertainty and variation in management approach in respect of the coastal environment. As noted by O'Hagan and Cooper (2002):

> The problem arising from this is that many coastal activities transcend jurisdictional and administrative boundaries which result in uncertainty and variation in management approaches" (A O'Hagan and J Cooper, *"Spatial variability in approach to coastal protection in Ireland"*, Journal of Coastal Research, Special Issue 36, 2002, pp544-551).

2.5 O'Hagan and Cooper in their article *"Spatial variability in approaches to coastal protection in Ireland"* note that the situation in ROI is so fragmented that the majority of coastal protection works undertaken fail to obtain the appropriate legal authorisations. As they note:

> The respondents [to the study] stated that there was so much applicable legislation and so many institutions involved that it was virtually impossible to do their job correctly. Ideally they want to see responsibilities clearly defined and everyone following the same procedures (p550).

2.6 It is interesting to note that Northern Ireland faces much the same issues as its southern counterpart. As noted in a report to the Department of Environment, despite the prominence given by the House of Commons Environment Select Committee Inquiry on Coastal Zone Planning and Protection to better co-ordinate coastal policy as early as 1992, a far from ideal situation still exists in terms of the management of Northern Ireland's coast:

> Coastal management and control in Northern Ireland is presently sectorally based, and various issues, at the same location, are often dealt with in isolation by different bodies. This can lead to delay, duplication of effort, lack of co-ordination and considerable confusion. There is also a lack of integration between local, regional and National levels of management (*"Options for management of Northern Ireland's Coastal Zone: Scoping Study Examining the Potential Establishment of Northern Ireland Coastal Forum"*, A Report to the Department of Environment, January 2003, p.6).

2.7 The report continues:

> To illustrate the complexity of statutory coastal zone management, since 1997 several pieces of legislation with relevance to the coastal zone of Northern Ireland have been enacted. These include 6 European Community Directives, 44 UK Statutory Instruments, 16 UK Public General Acts, 43 Statutory Rules of Northern Ireland and 2 Acts of the Northern Ireland Assembly. The implementation and administration of these acts rests with a wide variety of Northern Ireland and UK bodies (pp.6-7).

Planning framework

2.8 Planning laws in respect to land-use have recently been updated and consolidated in the ROI. The Planning and Development Act 2000 ("**PDA**"), replaces the Local Government (Planning and Development) Act 1963, and importantly introduces the notion of "sustainable planning and development" as a founding principle for land-use control and management in the Republic. Of particular interest are a number of measures included within this statute that are designed to protect coastal areas from

land use development, but which are inconsistent with the stated objectives for the area. Given the Act's recency, it is yet to be seen how the new legislation will operate in practice, although given the Act's confinement to land-use management it is unlikely to have any major impact in addressing the lack of integration that coastal planning in ROI currently experiences.

2.9 Under the PDA a planning authority is required to make a development plan for the whole of its functional area (s9). Section 10 of the PDA provides that a development plan shall set out an overall strategy for the proper planning and sustainable development of the area and shall set out the development objectives for the area in question. Subsection (2) sets out some of the objectives that a development plan **must** include:

> …
>
> (c) the conservation and protection of the environment including, in particular, the archaeological and natural heritage and the conservation and protection of European sites and any other sites which may be prescribed for the purposes of this paragraph;
>
> (d) the integration of the planning and sustainable development of the area with the social, community and cultural requirements of the area and its population;
>
> (e) the preservation of the character of the landscape where, and to the extent that, in the opinion of the planning authority, the proper planning and sustainable development of the area requires it, including the preservation of views and prospects and the amenities of places and features of natural beauty or interest;
>
> …
>
> (j) the preservation, improvement and extension of amenities and recreational amenities…

2.10 Further s10 provides that a development plan **may** indicate objectives for any of the purposes referred to in the First Schedule. Objectives outlined in this schedule include:

> **FIRST SCHEDULE**
>
> **Part I - Location and Pattern of Development**
>
> …
>
> 3. Preserving the quality and character of urban and rural areas
>
> …
>
> 6. Regulating, restricting and controlling development in areas at risk of flooding (whether inland or coastal), erosion and other natural hazards.
>
> 7. Regulating, restricting and controlling the development of coastal areas and development in the vicinity of inland waterways.
>
> 8. Regulating, restricting and controlling development on the foreshore, or any part of the foreshore.
>
> **Part IV - Environment and Amenities**
>
> 1. Protecting and preserving the quality of the environment, including the prevention, limitation, elimination, abatement or reduction of

> environmental pollution and the protection of waters, groundwater, the seashore and the atmosphere.
>
> …
>
> 4. Protecting features of the landscape which are of major importance for wild fauna and flora.
>
> …
>
> 6. Protecting and preserving (either in situ or by record) places, caves, sites, features and other objects of archaeological, geological, historical, scientific or ecological interest.
>
> 7. Preserving the character of the landscape, including views and prospects, and the amenities of places and features of natural beauty or interest.
>
> 8. Preserving any existing public right of way, including, in particular, rights of way which give access to seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility.

2.11 In promulgating a development plan a planning authority is also required "as far as is practicable" to ensure it is consistent which such national plans, policies or strategies as the Minister for the Environment and Local Government determines is required for proper planning and sustainable development (s9(6)).

2.12 The nature of A development plan has been described by the Irish Supreme Court in *The Attorney General (ex rel McGarry) v Sligo County Council* (1991) 1 IR 99 in the following manner:

> The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and allows the community the opportunity of inspection, criticism and, if thought proper, objection. When adopted, it forms an environmental contract between the Planning Authority, the Council and the Community, embodying a promise by the Council that it would regulate private development in a manner consistent with the objectives stated in the plan and, further, that the Council itself shall not effect any development which contravenes the plan materially. The private citizen, refused permission for development on such grounds based on such objectives, may console himself that it will be the same for others during the currency of the plan, and that the Council will not shirk from enforcing these objectives on itself.

2.13 Under the PDA a planning authority can also prepare a "local area plan" for areas within its functional area that have a population in excess of 2,000 (ss18 and 19). Section 19 requires that a local area plan be consistent with the objectives of the development plan and like the development plan, outline objectives so as to ensure the proper planning and sustainable development of the area to which it applies, including detail on community facilities and amenities, and on standards for the design of developments and structures.

2.14 The PDA also provides that regional authorities may, after consultation with the planning authorities within its region, or at the direction of the Minister, make regional planning guidelines (s.21). Section 23 states that the objective of regional planning guidelines shall be to provide a long-term (between 12 and 20 years) strategic planning framework for the development of the region. Further the PDA provides that, in accordance with principles of proper planning and sustainable development, a number of matters should be addressed in such guidelines, including:

> (i) the preservation and protection of the environment and its amenities, including the archaeological, architectural and natural heritage.

2.15 Under the PDA, a planning authority is required to have regard to any regional planning guidelines in force for its area when making and adopting a development plan (s27).

2.16 Finally, the Minister may at any time issue guidelines to planning authorities regarding any of their functions under the PDA, for which those planning authorities should have regard (s28). The Minister also has the power to direct an authority to amend a development plan where the Minister considers that the development plan fails to set out an overall strategy for the proper planning and sustainable development of the area (s31).

Applications to develop land

2.17 Under s32 of the PDA, permission is required in respect of any development of land that is not specifically exempt under the PDA. In making its decision on an application for permission under s34 of the PDA:

> **Section 34**
>
> (2) (a) … the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to -
>
> (i) the provisions of the development plan;
>
> (ii) the provisions of any special amenity area order relating to the area;
>
> (iii) any European site or other area prescribed for the purpose of section 10(2)(c);
>
> (iv) where relevant, the policy of the Government, the Minister or any other Minister of the Government;
>
> (v) the matters referred to in subsection (4); and
>
> (vi) any other relevant provision or requirement of this Act, any regulation made there under.
>
> …
>
> (4) Conditions under subsection (1) may, without prejudice to the generality of that subsection, include all or any of the following:
>
> …
>
> (d) conditions for requiring provision of open spaces;
>
> (e) conditions for requiring the planting, maintenance and replacement of trees, shrubs or other plants or the landscaping of structures or other land.

(Note: Section 202 of the PDA states that where, in the opinion of either the planning authority or Minister, an area is of outstanding natural beauty or has special recreational value, and having regard to any benefits for nature conservation, that area should be declared an area of special amenity and an order be made stating the objectives in relation to the preservation or enactment of the character or special features of the area, including objectives for the prevention or limitation of development in the area).

2.18 Part XV of the PDA further requires that permission be obtained from a planning authority in relation to the development on the foreshore in circumstances where, were such development carried out, it would adjoin -

(a) the functional area of a planning authority, or

(b) any reclaimed land adjoining such functional area.

2.19 Such a permission is in addition to those required under the Foreshore Acts 1933 to 1998, which provide further protection and preservation of the foreshore and seashore.

Case law

2.20 This paper now turns to consider how the Courts have dealt with objections to proposals for development of the coastal environment. As a preliminary point it should be noted that in the ROI the Courts have only a limited role in the adjudication of planning appeals and as a consequence there is a dearth of appeals to the Court on coastal development. The limited jurisdiction of the Court was described in *Tennyson v Corporation of Dun Laoghaire* [1991] 2 IR 527 at 534 in the following manner:

> Where a decision is made by a planning authority on an application made to it by a developer under Section 26 of the Act of 1963 for permission to proceed with a proposed development, it may be open to challenge on two broad grounds. First, on purely planning criteria (as, for example, a contention that the decision of the authority to exclude certain units from a proposed development was erroneous in that it was unnecessary and did not accord with good planning practice) and, secondly, that the decision is ultra vires the power of the planning authority. The latter category of dispute includes issues relating to the meaning of the development plan relating to the particular application. The Oireachtas (parliament) has provided in the planning code a forum for the adjudication of appeals from decisions of planning authorities within the first category i.e., those relating to planning matters per se. Such appeals are heard and determined by An Bord Pleanala which is a tribunal having the benefit of a special expertise in that area. The Court is not an appropriate body to adjudicate on such matters and in my view it ought not to interfere in disputes relating to purely planning matters. However, where the dispute raises an issue regarding a matter of law such as the interpretation of the wording of the development plan in the light of relevant statutory provisions and the primary objective of the documents, then these are matters over which the Court has exclusive jurisdiction. An Bord Pleanala has no authority to resolve disputes on matters of law (para 11).

2.21 The principles which guide the Court in determining the interpretation to be given to a development plan and consequently the *vires* of a planning authority's decision were set out in *Wicklow Heritage Trust Ltd v Wicklow County Council* [1998] 1 EHC 19 (5 February 1998) as follows:

> (1) It is for the Court and not for the planning authority to decide as a matter of law whether a particular development is a material contravention of the local development plan.
>
> (2) A development plan forms an environmental contract between the planning authority and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan and further that the Council itself will not effect any development which contravenes the plan materially. In seeking to interpret the objectives set out in a Development Plan the court should ask what a reasonably intelligent person with no relevant expertise would understand by the provisions in question.
>
> (3) The requirements of the planning law must be applied with as much stringency against the local authority as they would against a private developer.
>
> (4) It is necessary for a local authority to include all its objectives in its Plan. If it were otherwise it would mean that the local authority could totally override its own plan (para 59).

2.22 Although not a coastal development case, the earlier case of *O'Leary & Others v Dublin Country Council* [1988] IR 150 sets out an important background to the framework which the Courts employ in considering appeals under the PDA.

2.23 In this case the High Court considered by way of judicial review an application on behalf of some 300 residents against a proposal by the Council to establish a caravan park in Cherryfield Linear Park, on the basis that the proposal amounted to a material contravention of the County Development Plan and therefore was not permissible by law.

2.24 By way of background, under the earlier legislation (Local Government Planning and Development Act 1963) local planning authorities were only able to carry out such developments as are consistent with the provisions of their development plan and could not allow the carrying out of those developments which materially contravene the development plan.

2.25 There were two relevant paragraphs in the Dublin Country Development Plan 1983 at that time:

> It is a policy of the Council to conserve areas of high amenity at present in use and to seek to expand both these and further areas to absorb further recreational use without damaging their amenities. Such natural areas include the sea coasts, mountains and areas fringing waterways, both river and canal. The Council will seek the creation of rights-of-way, pedestrian and vehicular and the provision of carparks where required, subject to the ability of these areas to absorb more recreational use without damage to amenities.
>
> It will generally be the policy of the Council to prohibit development and to establish coastal or riverside walks on lands between the sea, or rivers, and adjoining roads. There may, however, be areas where, due to the natural configuration of the landscape or the existence of woodlands, such total prohibition of development may be unnecessary. In such cases the Council will consider applications for development where the application relates to uses pertinent to coast or riverside recreation within the recreational capacity of the area would not damage the visual amenities or limit public access to the beaches or riverside.

2.26 It is noteworthy that the proposed site would have been in close proximity to the River Dodder and it was argued that the proposal would have materially affected the amenity of the area.

2.27 The Respondent Council argued that the proposal would not amount to a material contravention of the development plan on the basis that the area designated as a High Amenity Area was vast and in that context the impact of the proposal upon that very large area would be small. Further it was argued that screening of the site by the use of trees and shrubs would further minimise the impact on the surrounding area.

2.28 It was held that the use of lands in area zoned 'high amenity' was prima facie a material contravention of the development plan which stated that use of the land for the accommodation of caravans designed for year round human habitation was not permitted. As noted by O'Hanlon J, in granting relief to the applicants:

> If an applicant were made by a private developer for permission to develop part of the lands in an area zoned as a High Amenity Area, by the erection of five dwellings for private residential accommodation, I have no doubt that it would be resisted strenuously by the planning authority on the basis that it would amount to a material contravention of the County Development Plan. I do not think a private developer would be allowed to argue that the area involved in his project was small in relation to the area compromised in a particular High Amenity Area, and that therefore the contravention, if any, was not "material". I think the requirements of the planning law have to be applied with the same stringency

> against the local authority in this case as would be the case if the proposal came from a private developer.

2.29 *Arklow Holidays Limited v Wicklow County Council & Anor* [2003] 1 EHC 68 (15 October 2003) involved opposition by Arklow Holidays, a caravan park facility, to the grant of planning permission for a waste water treatment plant at Arklow. The relevant development plan described the area as a landscape zone of outstanding natural beauty, which included a coastal area of very high vulnerability. The Court noted that this area formed an uninterrupted part of the Wicklow Arklow preliminary route for coastal walking.

2.30 Further the plan designated all the coastline between Wicklow and Arklow as being of outstanding natural beauty, with the following relevant objective:

> To provide for agricultural and forestry uses, to allow for essential rural housing needs and to provide for development in accordance with the policies outlined for other land uses in this development plan, which are consistent with the landscape zoning.

2.31 Section 2.4.2 provided that the Council "will preserve all views and prospects of special amenity value or special interest from unnecessary and harmful development". Section 3.3.11 of the plan further provided that the Council "will reinforce and preserve the scenic quality of this zone by restricting development in it." Importantly in this case the development plan also included as one of its policies "to provide for and facilitate improved waste water treatment works for the Arklow Urban Area and Arklow Environs Area" (Policy 7.10(3)).

2.32 One of the grounds of opposition raised by the appellants was that the grant of planning permission was in material contravention of the Wicklow development plan. To that end evidence was given that the plant would be materially intrusive to, and destructive of the amenity character of the area and in contravention of section 3.3.11 of the plan.

2.33 Ultimately, the Court determined that by virtue of the inclusion of an objective to develop a waste water treatment facility, notwithstanding the prohibition of development in the area, it was within the planning authority's imprimateur to grant permission.

2.34 This case is one of a raft of decisions dealing with objections as to the location of waste management schemes in areas of high amenity. It is interesting to note that the recent Protection of the Environment Act 2003 will curb substantially the ability of the public to object to planning applications for waste facilities on the grounds of amenity preservation. Whereas previously objectives of waste management schemes needed to be specifically provided for in development plans, otherwise such schemes were deemed to be in conflict, in the future waste management plans promulgated under this Act will take precedence over development plan objectives, meaning that waste management needs, not matters of amenity preservation, are what will now primarily determine whether a waste facility can be built.

Comparative Analysis

2.35 Of the two countries examined, the planning regime employed in the ROI is probably the more similar to that of the RMA. It is also interesting to see the use of terms not dissimilar to language found in the RMA, such as "strategy for proper planning and sustainable development"; "the conservation and protection of the environment"; "the presentation of the character of the landscape," etc. There are several areas where the RMA provides obvious advantages over the Irish PDA, and hence useful lessons for coastal management in the New Zealand context.

2.36 One of the most obvious advantages of the RMA over the PDA is its mandatory hierarchy of planning documents which provide a national framework for regulators at a local/regional level and as a consequence some consistency between plans. Section 57 of the RMA requires the Minister of Conservation to prepare at least one New Zealand Coastal Policy Statement ("**NZCPS**") setting out the policies by which the coastal environment will be managed. Whilst it is accepted that some believe the guidance provided by the NZCPS for regulators at a regional level has from a practical viewpoint been poor (see the *Report on the Independent Assessment of the New Zealand Coastal Policy Statement*), the situation still compares favourably with that of the ROI where there is no mandatory mechanism for a national guiding document and therefore the potential for substantial inconsistency in the objectives of development plans between counties with respect to the coastal environment. Thus in the ROI a development plan need only be consistent with national plans, policies or strategies as the Minister determines are necessary for proper planning and sustainable development, and only "as far as is practicable". Likewise it is discretionary for regional authorities to establish regional planning guidelines (s21) and a planning authority is only required to have regard to such guidelines in making and adopting a development plan (s27). This compares with the requirement under the RMA that a regional coastal plan must be prepared, and must give effect to, and not be inconsistent with, any national policy statement or NZCPS (s67).

2.37 Further, protection of the coastal environment is given much less emphasis as a key objective to be addressed in development plans. There is no particular reference to the protection of the coastal environment in s10 of the PDA, which sets out objectives that must be included within a development plan. Rather regulating, restricting and controlling the development of coastal areas and the foreshore is only an optional matter to be addressed in such plans. This compares with the RMA which affords special protection on the use, development and protection of the coastal environment by virtue of s6 matters of national importance (see for example s6(a)).

2.38 Applications to develop land in a manner that is inconsistent with objectives seeking to protect the coastal environment is arguable easier in the ROI - a proposed development must 'materially contravene' a development plan for an application to be refused. In NZ however, the test is potentially more difficult for a developer in that for non-complying activities at least, the proposal must not be contrary to the objectives and policies of the relevant plan (s104D) and of course is still subject to Part II of the RMA. Further, as was the situation in the *Arklow* case, a development plan can contain some strong objectives about the need to protect a coastal landscape of outstanding natural beauty and still be trumped by an objective in the plan providing for a waste water treatment plant for that area.

British Columbia

2.39 British Columbia's ("**BC**") coastline is vast, consisting of 27,000 kms of coastline and more than 6,500 coastal islands. Over three-quarters of the population lives on or near the coast, with the Province's population concentrated in the coastal cities of Vancouver and Victoria, and in the rapidly growing communities on the east coast of Vancouver Island ("*Preserving British Columbia's Coast: A Regulatory Review*", West Coast Environmental Law, 1999).

2.40 As with other countries, BC suffers from on-going degradation of its coastal environment resulting largely from competing demands being placed on the resource. As noted in the publication *"Coastal Shore Stewardship: A Guide for Planners, Builders and Developers on Canada's Pacific Coast"*, The Stewardship Series, BC faces increasing commercial and industrial demands for access to foreshores, more waterfront homes and increased demand for recreational use of the coastline. Balanced against these demands is the need to protect the basic functions and values of the coastal environment that created such demand in the first place.

2.41 The current situation has been described as follows:

> British Columbia's extensive coastline encompasses innumerable islands, deep fiords, inlets and estuaries. From the main population centres in the south to the small communities which dot the coastline, coastal areas are critical to the social, cultural and economic fabric of British Columbia. Many of these communities have experienced an economic downturn from reductions in industrial forestry and commercial fishing, and are looking to alternative economic opportunities such as aquaculture, recreation, ecotourism, cultural tourism, cruise ship terminals, offshore oil and gas development, and offshore wind and wave energy. The resulting increased demands for coastal lands raises the potential for users conflicts within a natural environment internationally recognized for its rich biodiversity and scenic beauty (from *Implementing GISs for Coastal Planning: Lessons Learned in British Columbia*, Rosaline Canessa, Department of Geography, University of Victoria (CA)).

2.42 Jurisdiction for making decisions regarding use of the coastal environment is shared between Federal, Provincial and Local Governments, as well as First Nation Governments. The Federal Government's role focuses primarily on protecting fish and aquatic habitat, marine mammals, and migratory bird habitats; maintaining navigable waters; regulating disposal of materials to deep ocean; assessing the environmental impacts of Federal projects; and designating protected areas. The Provincial Government in contrast focuses on coastal zone planning with respect to land and resource use. This involves allocating, licensing and regulating the use of Crown foreshore and aquatic lands; approving and regulating discharges to coastal waters; approving and regulating aquaculture operations; regulating mineral, oil and gas development; and designating protected areas. Finally, Local Governments, Municipalities and Regional Districts are responsible for the preparation and implementation of regional and community plans. Largely this centres around the approval and regulation of residential, recreational, commercial and industrial development along coastal shores. First Nations also have a role in exercising aboriginal rights to traditional lands and waters along the coast.

2.43 As might be expected, integration of decision-making processes between governmental bodies is an issue:

> Despite the array of laws described above, coastal habitat continues to be lost or damaged at an alarming rate. There are no laws in British Columbia designed specifically to protect the coastal zone, as in the United States, which has a Federal Act, the Coastal Zone Management Act and many strong state laws, such as Washington's Shoreline Management Act and California's Coastal Act.
>
> The legal gaps relate to:
>
> - no proactive integrated planning to protect environmentally sensitive coastal habitat while allowing development in less sensitive areas;
> - a lack of binding and enforceable requirements to protect coastal habitat;
> - inadequate use of available legal powers;
> - inadequate resources and enforcement;
> - no cumulative impact assessment of individual developments or activities;
> - a lack of public participation opportunities to allow members of the public to take actions to protect coastal areas.

(*"Preserving British Columbia's Coast: A Regulatory Review"*, Background Report by West Coast Environmental Law, 1999).

Planning framework

2.44 Coastal planning in BC varies according to who owns the coastal land in question. For example the Federal Government maintains jurisdiction over Federal land (eg harbours, national defence land, airport and railways) and will manage these lands under separate statutes such as the Canada Marine Act 1998, National Defence Act 1985, Canadian Environmental Assessment Act 1992, Harbour Commissions Act 1985, and Fisheries Act 1985. If a proposed coastal development has the potential to affect fish habitat or navigation on waters then it will also be subject to the Federal Fisheries Act 1985 and the Federal Navigable Waters Protection Act 1985.

2.45 If land is First Nations land or reserve land, it is owned and managed federally by the First Nation pursuant to the Indian Act 1985 or through the First Nations Land Management Act 1999, s20. The First Nations Land Management Councils can be viewed as de facto Governments, having legislative authority to make laws regulating land use and development, including zoning, subdivision control, environmental assessment and protection for lands within their reserve, although they are still subject to Federal constitutional documents.

2.46 For the majority of coastal land (about 92%) the Provincial Government is the primary regulator of land use activities, subject of course to Federal jurisdiction over issues like fisheries, migratory birds, harbours, marine waters and ports. The province of BC also holds the legal title to the majority of the foreshore (the area between the high and low water line which is exposed at low tide) and the beds of bodies of water "within the jaws of the land", such as the Strait of Georgia and other inland seas.

2.47 The Provincial law used to regulate and manage the use and disposition of all Crown land, including Crown coastal land, is the Land Act 1996. Under this Act land managers are afforded wide discretion to allocate and manage coastal land and there no regulatory guidelines currently in place for foreshore development. The Land Act also gives the Province wide discretion to dispose of Crown land through sales, licences to occupy, easements, or leases (subject to other regulatory controls such as Federal controls).

2.48 Local Governments further regulate coastal land use through the Local Government Act 2002 ("**LGA**"). Under Part 25 of the LGA a local government may adopt a Regional Growth Strategy ("**RGS**"). A RGS is a permissive, but not mandatory obligation on regional districts and its purpose, as set out in s849 of the LGA, is to establish a course of action to meet common social, economic and environmental objectives and is used for the purposes of guiding decisions on growth, change and development within a Regional District. The contents of an RGS are set out in s850 in the following broad terms:

> **Content of regional growth strategy**
>
> (2) A regional growth strategy must cover a period of at least 20 years from the time of its initiation and must include the following:
>
> (a) a comprehensive statement on the future of the region, including the social, economic and environmental objectives of the board in relation to the regional district;
>
> …

> (c) to the extent that these are regional matters, actions proposed for the regional district to provide for the needs of the projected population in relation to:
>
> (i) housing;
>
> (ii) transportation;
>
> (iii) regional district services;
>
> (iv) parks and natural areas; and
>
> (v) economic development.
>
> (3) In addition to the requirements of subsection (2), a regional growth strategy may deal with any other regional matter.

2.49 The effect of an RGS once adopted is that all bylaws subsequently promulgated by the regional district must be consistent with the RGS.

2.50 Another planning tool available to Local Government is an Official Community Plan ("**OCP**") as set out in s875(1) of the LGA:

> An official community plan is a statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government.

2.51 Any OCP promulgated needs to be consistent with the goals set out in an RGS. An OCP is not however, directly binding on the Local Government (s884(1)), although all bylaws enacted or work undertaken by a Council board or greater board after the adoption of the OCP must be consistent with the relevant plan.

2.52 Split responsibility between Federal, Provincial and Local Governments and First Nations has lead to a fragmented approach to coastal management in BC, although integration between these governmental bodies is in the process of being improved. As noted in the *"Province of British Columbia Coastal Zone Position Paper"*, June 1998:

> The province's coastline plays a significant role in our economy and culture, and is of major environmental significance. Threats to the sustainability of coastal communities and resources require that we take a more holistic and coordinated management approach to this important area. Given our substantial stake in maintaining a healthy marine environment, and our significant role and jurisdiction in coastal lands and resources, we intend to partner with all governments to develop a more coordinated and integrated management approach to the coastal zone (p 2).

2.53 Recently BC has undertaken to develop a series of coastal plans:

> Governance and management of coastal lands is the shared responsibility of the federal government, First Nations, provincial government and local government. However, it is the provincial government that is primarily responsible for issuing tenures on intertidal lands and subtidal lands within inland waters. These tenures are evaluated through a multi-agency referral process. In an effort to streamline and provide consistency to the referral process, the province of British Columbia is developing a series of coastal plans with the overall objective of enhancing sustainable economic development opportunities of coastal communities on an environmentally sustainable basis. The plans are intended as guidelines for issuing and reviewing tenures by recommending acceptable foreshore and nearshore uses including recreation and conservation values that should be reserved or withdrawn from tenure opportunities (from *Implementing GISs for Coastal Planning: Lessons Learned in British Columbia*, Rosaline Canessa, Department of Geography, University of Victoria (CA)).

2.54 These plans are currently in the process of being promulgated.

Development Permits

2.55 Land owners may apply under s922 of the LGA for a Development Variance Permit ("**DVP**"), which exempts them from compliance with a zoning bylaw that would otherwise apply to them.

2.56 Development Permit Areas ("**DPAs**") are designated in an OCP and may be used for a number of purposes. Areas designated as DPAs cannot be altered, subdivided or built on without a development permit from the Municipality. Councils do have a discretion about whether to issue a development permit in a particular case. However pursuant to s920(1)(i) of the LGA the discretion must be exercised reasonably and in accordance with the guidelines specified in an OCP. Therefore if an applicant meets the guidelines set out in the OCP for DPAs then the Council must approve the application.

2.57 Often Councils and boards adopt policy statements with guidelines to direct land use and development, but do not formally adopt the guidelines as bylaws. An example of these are the *BC Land Development Guidelines for the Protection of Aquatic Habitat*. These guidelines whilst persuasive may be ignored by local governments in land-use decisions unless the guidelines have been incorporated into a bylaw.

2.58 Further, unlike New Zealand, there is no blanket or automatic requirement for an assessment of environmental effects ("**AEE**"). An AEE for projects on BC Provincial Crown land, like that on Federal land, only applies to major industrial and infrastructure projects. The BC Environmental Assessment Act 2002 ("**BCEAA**") only requires an AEE to be undertaken when the project has significant adverse environmental effects.

Case law

2.59 In practice OCPs are relatively weak legal tools for protecting coastal land, with the Courts having taken a very liberal approach to deciding when bylaws will be held to be consistent with an OCP. An example is provided by the case of *Streigel v The District of Tofino* (Decision Number A934238 (1994) BC SC) ("**Streigel**"), where the BC Supreme Court had to decide whether or not the re-zoning of an undeveloped beach headland in order to allow the construction of a motor hotel on the property was inconsistent with the OCP.

2.60 The bylaw in question purported to rezone the beach headland from "Forest Rural" to "Tourist Commercial". The District had subsequently issued a development permit in reliance on this bylaw for a forty-room hotel to be constructed on the headland, which was at the time undeveloped. The case turned on whether or not both the bylaw and the subsequent issue of a development permit were consistent with the OCP and therefore valid.

2.61 The OCP provided for the protection and enhancement of natural features of the headland with "access to the shorelines, natural habitats, heritage features, view planes and air and water quality …" as primary goals. The plan went on to set out the following objectives and policies:

> **10.0 Environmental Objectives and Policies**
>
> …
>
> **10.2 Objectives**
>
> …

> (b) To protect all shorelines and adjacent uplands, and vegetation within the District from the negative impacts of development through appropriate setbacks, zoning provisions, and restrictive covenants.
>
> **10.3 Policies**
>
> (b) Shorelines of the District represent diverse natural environments and recreational opportunities; the District shall endeavour to protect those shorelines by requiring an appropriate setback. The District shall prohibit development and the placing of fill on area beaches and shorelines and within the required setbacks of the appropriate designation.
>
> …
>
> (f) The lands abutting Pacific ocean have been identified as having headlands and uplands with vegetation sensitive to blowdowns from cutting and clearing therefore sites should be retained in their natural features through appropriate setbacks, zoning provisions and restrictive covenants.

2.62 In interpreting s949 of the then Municipal Act 1979 (now section 884(2) of the LGA) the Court followed the approach adopted by an earlier case of *Rogers v Saanich (District of)* (1983), 22 MPLR 1 (BC SC) which decided:

> The written effects of planners are really objectives and unless there is an absolute and direct collision such as there was in the *Cal Investment* case, they should be regarded generally speaking as statements of policy and not to be construed as would be acts of Parliament (p.23).

2.63 In adopting this high threshold, the Court in *Streigel* held that even though the zoning bylaw was inconsistent with particular provisions in the OCP, in viewing the plan as a whole the development permit and bylaw were not in conflict with the plan and were therefore valid.

Discussion

2.64 The BC approach to regulating coastal development suffers from numerous weaknesses when compared to New Zealand's coastal planning regime. Key amongst these is the lack of integration in the decision-making process between governmental bodies.

2.65 The regulation of coastal development is split between Federal and Provincial jurisdiction, as well as Municipal and Regional District Local Government bodies, and is typically dealt with in an ad hoc manner. This in turn causes practical problems in terms of integrating and coordinating the various regulatory bodies that govern any development within the coastal environment.

2.66 Further, even those planning mechanisms that are in place (for example RGSs and OCPs) are in practice relatively weak management tools for regulators. First, an RGS need not be adopted and there are no specific requirements in the LGA for either a RGS or OCP to include objectives and policies regarding coastal management. In addition Provincial Authorities have only just begun to create Province wide policies and guidelines that, whilst not binding, can be used by Regional Districts to develop consistency from region to region (for example the *BC Province Coastal Position Paper* 1998, is an example of a recent attempt to coordinate coastal environmental decision making). Second, although an OCP must be consistent with an RGS there is no guidance as to how this takes place, nor is there any procedure for ensuring consistency between RGSs adopted by different Regional Districts and between OCPs. Finally, the OCP itself is a weak document. Courts have watered down the regulatory value of OCP

provisions to the extent that unless the zoning bylaw or development permit is completely inconsistent with the OCP, it will still be held to be valid.

2.67 Overall the BC coastal regulatory frame work suffers from a lack of consistency on both an inter and intra government level.

3. COASTAL LEGISLATION IN NEW ZEALAND

3.1 Development of coastal planning in New Zealand in many respects has taken a similar course to planning regimes overseas. Management of the coast was only included within the resource management law reform process relatively late in the day, with the decision in September 1988 that the Coastal Legislation Review being undertaken by the Ministry of Conservation be merged with the general review of resource management law in New Zealand (*People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform*, Wellington, Ministry for the Environment, December 1988).

3.2 Prior to the RMA, management of our coasts was dealt with in a fragmented and complex manner, whereby multiple consents were typically required under legislation such as the Harbours Act 1950, Water and Soil Conservation Act 1967, Town and Country Planning Act 1977 and the Marine Pollution Act 1974 (*Explanatory Note to the Resource Management Bill 1989 (224-1)*). As noted in *The Government's Response to the Review Group Recommendations*, 2 May 1991, at that time a total of 43 statutes and more than 20 agencies were involved in the administration of New Zealand's coastal areas. This lead to genuine concerns regarding the dispersed approach to coastal planning and the ability for decision-makers to arrive at good environmental outcomes. The situation was described in the Resource Management Law Reform process in the following manner:

> The net result has been a system which is not easily operated to deliver good results. Recent changes saw the Department of Conservation assume responsibility for administering parts of the Harbours Act, in many cases in conjunction with the Ministry of Transport. The Ministry of Transport also continued to play a role in respect of port areas. Harbour boards and territorial authorities are also involved in management through planning functions. Some territorial authorities exercise planning control over water areas, catchment boards have water management responsibilities and there are four maritime planning authorities in New Zealand. Several regional councils have planning schemes which extend over coastal areas. To add to this plethora of agencies, other government departments such as MAF and Ministry of Energy have regulatory functions which affect the coast. (*People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform*, Wellington, Ministry for the Environment, December 1988, p.45).

3.3 The result of this review process, and the RMA that ultimately ensued, was a coastal planning regime in New Zealand that dealt with coastal management in a more comprehensive and integrated manner. Responsibility for coastal management under the RMA is now shared primarily between the Minister of Conservation and Regional Councils, although territorial authorities also have a role in some situations. Importantly, and with few exceptions, the RMA provides a 'one stop shop' for obtaining consents for all aspects of development of the coast.

Room for improvement to achieve "best practice"

3.4 While the integrated approach of the RMA is a vast improvement on the previous regime, and indeed one might argue on those planning regimes adopted in other jurisdictions, especially Ireland and British Columbia as we have seen, there is still room for improvement to achieve "best practice". We will now touch on some of the areas peculiar to the coastal regime under the RMA where amendments could usefully be

made. (There are many other more general improvements possible to the RMA as a whole, some of which may hopefully be the subject of the Government's current review of the legislation, which would also improve practice in coastal areas). We will also comment briefly on the ideas advanced by the Hon Peter Salmon QC in his paper to the conference "*Strengthening the RMA*".

Remove or reduce role of Minister of Conservation

3.5 The role of the Minister of Conservation in coastal management under the RMA has been a contentious issue for some time now (*Report of the Committee on the Resource Management Bill*, NZ House of Representatives, 1990). At present the Minister assumes four key roles:

(a) preparing national coastal policy statements;

(b) approving regional coastal plans;

(c) acting as the consent authority for restricted coastal activities; and

(d) as a party to RMA proceedings through lodging submissions under the RMA on policy statements, plans and resource consent applications under the Minister's advocacy role under the Conservation Act.

3.6 It is clearly appropriate that the Minister be able to issue national policy statements and in the coastal area, that is the mandatory NZCPS.

3.7 It is interesting to note that at the next level, with regional policy statements, which cover the coastal environment, the Minister of Conservation does not have any approval power. Instead, a regional policy statement "must give effect to a national policy statement or New Zealand Coastal Policy Statement" (s62(3)).

3.8 When it comes to regional coastal plans one of the matters to be considered by a Regional Council in the preparation of its regional coastal plan is "the Crown's interests in land of the Crown in the coastal marine area" (s66(2)(b)), and the regional coastal plan must also give effect to any NZCPS (s67(2)), and must be consistent with any regional policy statement (s67(2)(b)). Nevertheless despite all that, the Minister of Conservation still has a right of final approval of a regional coastal plan (s28(b) and First Schedule).

3.9 Given the whole framework of the RMA where it is the Minister who sets the overriding document, the NZCPS; where the Minister can be a submitter on a proposed regional policy statement and that regional policy statement must give effect to the NZCPS; and under the First Schedule and the sections referred to above not only must the Minister of Conservation be consulted over the preparation of the regional coastal plan, but regard must also be had to the Crown’s ownership of land in the CMA and the regional coastal plan must be consistent with the regional policy statement and give effect to the NZCPS; and the Minister of Conservation can be a submitter on the regional coastal plan; it is extremely difficult to see any true justification for the further layer of approval power whereby no Regional Council nor the Environment Court can have the final say on the regional coastal plan.

3.10 It has been said that one reason, or perhaps the main reason, for this final approval power is that through rights of exclusive occupation of the coastal marine area being available under s 12 of the RMA, which is effectively the main "property right" people obtain in the coastal marine area under the RMA, this is justification for the Minister having the final say on regional coastal plans which might authorise certain types of occupation as of right, or by way of controlled activities without involvement of the Minister. That contrasts with the situation on land above MHWS, where even if a

resource consent is granted or a district plan allows an activity as of right, where the Crown is the owner of the land concerned that activity cannot take place unless the Crown authorises it under its separate rights as a property owner.

3.11 We consider that there are sufficient safeguards in the system, as described earlier, for the Minister not to need that final right of approval of regional coastal plans. As a matter of practice, with some 13 years having occurred since the RMA was introduced, it would be interesting to know exactly to what extent the Minister has exercised that power and required some changes to a regional coastal plan, how substantive those changes were (if any) and therefore on a re-evaluation, whether it really is worth retaining this additional step in the RMA plan process.

3.12 We turn now to the separate power given to the Minister to be the ultimate consent authority for all the activities which the Minister has determined shall be restricted coastal activities. This power should, in our opinion, be removed. The same "property right" issue referred to above seems to be the only substantive argument put forward in favour of the approval power resting with the Minister. But given all of the other safeguards - the criteria in the legislation itself which is dictated by Parliament, the contents of the NZCPS which the Minister can make as effective as he or she wishes, and the way in which regional policy statements and regional coastal plans have to give effect to the NZCPS, (particularly where the Minister is the party still currently holding approval power over the regional coastal plan), surely there is no further need for the Minister to be the consent authority. Regional Councils and the Environment Court should have that power, as they do in all other situations.

3.13 Having restricted coastal activities skews the whole process and certainly does not amount to "best practice". A project can require many different types of consents under the RMA, including multiple coastal permits. Leaving aside the fact that all restricted coastal activities have mandatory public notification, whereas other activities where a Regional Council is the consent authority go through the normal tests for notification/non-notification, it is unhelpful to have a hearing situation with a hearing body that has a decision-making power over many aspects of a project, but on other aspects they can only make a recommendation and some third party (not involved in the hearing) ultimately makes that call. Quite apart from the lack of integrated management that this entails, there is also the inevitable potential involvement of political factors creeping into the resource management process at the final stage.

3.14 But perhaps the most important factor why the restricted coastal activity process is inappropriate is the fact that the Minister is frequently involved as a submitter on applications on which the Minister will be the ultimate decision-maker. This places applicants (in particular) in an invidious position. The Minister of Conservation, through delegated officers, will frequently lodge a submission on an application and among other things, may call for significant restrictions to be placed on the proposal by way of conditions, or by a reduced grant of consent. It is not unknown in such instances that the Minister's departmental staff make it clear to an applicant that the applicant will need to accept the restrictions sought by the Minister, because if they are not recommended to be imposed by the Regional Council or later by the Environment Court, the Minister will impose them in any event under his or her consent authority powers. This is not an acceptable form of pressure and the true merits of any such suggested restrictions or conditions should be able to be fairly considered by the applicant putting its views forward and the Minister of Conservation as a submitter putting his or her views forward, and letting the Regional Council or the Environment Court decide between the competing parties on the merits.

3.15 To a lesser extent there is also the added cost of the delay that can occur where an applicant has to wait for the final decision for the Minister. A further complication of that delay, is the possibility of law changes occurring which might potentially require the

Minister of Conservation to refer the matter back to the previous consent authority for reconsideration (as occurred in the Whitianga Waterways case).

3.16 There is also the unnecessary complication, throughout the process, of the list of restricted coastal activities changing. For example, if there is an operative regional coastal plan in place with a list of restricted coastal activities and the Regional Council makes a recommendation on those matters of a project which fall in that category, rather than a decision, and perhaps the Environment Court does likewise, but at some stage during the process before it gets to the Minister a proposed regional council coastal plan becomes operative so that the old plan falls away, then at that point there will be a new list of restricted coastal activities. Some aspects of the project may now no longer be restricted coastal activities, so that the consent of the Regional Council and the Environment Court is required (not just a recommendation as may have occurred) and the Minister of Conservation is no longer the consent authority. Conversely, there may be some aspects which the Regional Council or even the Environment Court considered and decided on, but they now fall in the restricted coastal activity classification in the new operative plan. The RMA does not appear to address this potential problem.

3.17 Ideally the role of the Minister as a consent authority should be removed.

Role of Territorial Authorities on Reclamations

3.18 With reclamation proposals, the key approvals are coastal permits. They will be needed from the Minister of Conservation (who ensures that all reclamations of any substance fall within his or her jurisdiction, as most are restricted coastal activities) and from the Regional Council (discharges of storm water during construction and after completion, consents for associated wharf structures and the like). But in addition, under section 89 of the RMA, the adjacent territorial authority is the consent authority for anything to be undertaken on top of the reclamation after its being reclaimed, as if the application related to activities occurring within its district.

3.19 The theory behind this power is that ultimately, once the land is reclaimed, the district will extend to incorporate the new dry land, so perhaps the territorial authority who already decides land uses on adjoining land, should have that power in the case of the new reclamation. However, this is an unsatisfactory result in several ways.

3.20 First, it adds yet another consent authority to the process. The Minister of Conservation (or the Regional Council if the Minister of Conservation gives up that role) is already the key agency deciding whether or not to allow the reclamation. It is extremely difficult to divorce the purpose of the reclamation which is the subject of the Minister's decision, from what is proposed to occur on top of it. Effectively, the reason for undertaking a reclamation - to undertake port activities or whatever is the same reason for both reclaiming the land (the reclamation consent needed from the Minister) and to undertake activities on top of the reclamation (the land use consent needed from the territorial authority). It is unnecessary duplication. It adds to the cost and delay. Two Councils, two sets of consultants hired by the Councils, joint hearings, two decisions, two respondents on appeals and so on.

3.21 Secondly, there is confusion over what plans apply. The area to be reclaimed, being in the coastal marine area at the time, will be the subject of a regional coastal plan which will no doubt have a number of relevant objectives and policies and rules. These will obviously guide the decision on whether or not the land ought to be able to be reclaimed. But what plan is supposed to guide the territorial authority in deciding whether or not to allow the activities on top of the reclamation? The district plan does not cover that area at present, it not being in the district at the time of the hearing. Yet section 89 refers to the territorial authority deciding the application as though those activities were within the district. Most district plans, while obviously not having any zoning covering an area to be reclaimed, nevertheless have a number of general

provisions that are said to apply district wide. These general provisions of the plan could perhaps be treated as applying to the land to be reclaimed, for the purpose of the land use consent required under section 89. Given that the land itself is not shown on the planning maps and will not have a detailed list of permitted, controlled and discretionary activities (etc), does that make all of the proposed activities innominate? Or are the provisions of the regional coastal plan, which does apply to the site of the land to be reclaimed at present, to be applied or given consideration to by the territorial authority? If so, why should they be administering that plan for the purposes of their s89 consent?

3.22 We suggest that it would be a lot simpler and make more sense if not only the reclamation consent itself were granted by the Regional Council (or the Minister if that power continues to apply) but also the activities to be undertaken on top of the reclamation, so there is one integrated process and only the regional coastal plan will apply. Obviously an adjacent territorial authority can participate as a submitter and inevitably there would have been prior consultation.

Buildings and structures spanning MHWS

3.23 Another area of undue complexity under the coastal provisions of the RMA is where you have a proposed building or structure to be erected which commences on dry land above MHWS but spans that boundary into the coastal marine area. Two examples can be used to illustrate the point. One of the principal buildings forming part of the New Zealand National Maritime Museum (originally known as the New Launchmans Building where the reception, shop and convention facilities are all located) is partly on the Eastern Viaduct, which is dry land, and partly overhangs the water on piles. Obviously internally it is one single building. Yet it has the unfortunate situation of an imaginary line going through the building and one half of it is in the jurisdiction of the Auckland City Council as territorial authority and one half of it is in the jurisdiction of the Auckland Regional Council because it is in the coastal marine area.

3.24 Another example can be found with most ship berths alongside reclamations in port areas. Major reclamations generally have sloping seawalls protected by rock armouring of some sort. Ships cannot berth against sloping seawalls, so wooden or concrete wharf structures are built to provide a vertical surface against which the ships can berth. The inner part of such wharf structures where they join on to the top of the sloping seawalls lie above MHWS and are therefore in the district of the adjoining territorial authority. The outer parts are in the jurisdiction of the Regional Council. So looking at things more broadly, throughout most ports in New Zealand all reclaimed areas are within districts, and all stand alone wharves, or wharf structures adjacent to reclamations, are in the Regional Council's jurisdiction. So seamless port operations have to deal with non-seamless RMA regimes.

3.25 For many new buildings and structures this often means duplication - consent applications for the same building or the same structure have to be made to two different authorities and considered against the provisions of two different plans and two consents obtained. Generally this equates to double the costs or certainly substantially increased costs, for no gain.

3.26 Ports may often be dealing with up to four plans at any one time - two operative plans and two proposed plans - and a multitude of plan changes and variations.

3.27 The RMA does provide some assistance as there are powers for, say, a District Council to transfer its functions to a Regional Council or vice versa (s33) and for a combined regional/district plan to be prepared for a waterfront area (s80).

3.28 Some thought should therefore be given through more direction being inserted in the RMA itself, or by better practice, to achieving a seamless regime for port areas and

urban waterfronts (in particular), where unnecessary costs and complications arise at present at the MHWS interface. Ideally, there should be only one body and one plan.

Duplication where Local Government Act districts extend across MHWS

3.29 Further unnecessary complexities can arise where a territorial authority's Local Government Act district (but not their resource management powers) extend beyond MHWS. This can quite frequently be the case. That can lead to a number of situations where multiple approvals are required for the same work.

3.30 To use another example to illustrate the issue, the territorial district of the Auckland City Council under the Local Government Act ("**LGA**") extends out and incorporates all of the buildings making up the New Zealand National Maritime Museum, including those located on Hobson Wharf which is fully in the coastal marine area. Under its LGA powers, the Council has a signs bylaw which places heavy restrictions on what signs are allowed and sets up a process for approval of any signs that go outside the rules in the bylaw. This can involve a hearing before a committee that considers any exemption application. Yet the same buildings, because they are in the coastal marine area, are provided for in the regional coastal plan and the regional coastal plan has its own provisions controlling signs. These require a resource consent from the Regional Council for any sign that goes outside the performance standards for permitted signs contained under that plan.

3.31 Accordingly, the New Zealand National Maritime Museum has had the unsatisfactory and expensive experience of having to make applications to both the Auckland Regional Council and to the Auckland City Council for separate consents for exactly the same sponsors' signs under these two distinct processes. The filing fees from the two Councils and the processing costs exceeded or amounted to a significant proportion of any revenue that would be generated by the signs in question.

3.32 This LGA/RMA duplication is another area where improvements to the coastal regime could be made.

Comments on "*Strengthening the RMA*", the paper presented by Hon Peter Salmon QC

3.33 In order to assist further in identifying ways of improving "best practice" under the RMA, it is perhaps worth making a few brief comments on the matters raised by the Hon Peter Salmon QC in his conference paper entitled "*Strengthening the RMA*".

3.34 In that paper, the author rightly notes the important role in the whole RMA process of the NZCPS. He refers to certain key provisions in that document. In our experience, the NZCPS is not a particularly influential document on a day-to-day basis, in the sense that it does not seem to feature much as a key factor in the decision-making processes dealing with the coast under the RMA. Of course to some extent it could be said that its value is as the background document behind the documents that are dealt with more directly and regularly, ie the regional policy statements and regional and district plans, as they must have given effect to the NZCPS. But we wonder really how much real value the NZCPS is to the authors of regional policy statements and regional and district plans and to resource consent hearing bodies? Certainly, if the Minister of Conservation believes that there is a need for an improvement in the way Regional Councils and territorial authorities deal with subdivision and development on the coast, then potentially the first step should be to promote changes to the NZCPS and provide more explicit guidance.

3.35 Of course in the past, Central Government has not shown a huge amount of enthusiasm for new national policy statements. Nevertheless, were the Minister of Conservation minded to notify a new NZCPS, then the public should be aware that as a result of

changes made to the Board of Inquiry process under the RMA, an unsatisfactory situation now exists. We are referring here to the removal of the "further submission" process, which no longer exists for submissions on any NZCPS to a Board of Inquiry.

3.36 When the current NZCPS was publicly notified, there were a vast number of submissions lodged on it. Many of those submissions sought significant, or even radical, changes to the document, which would have altered its entire approach. Those submissions were naturally of some alarm, depending on the requests being made, to environmental groups as well as to persons regularly undertaking activities in the coastal marine area. These other groups were able to raise those concerns about the changes being sought with the Board of Inquiry, by utilising the further submission process. In that manner, at the hearings the Board of Inquiry was able to receive both sides of the argument - the factors in favour of the changes being put forward by the original submitters, and the potential implications of those ideas on the environment, or on activities that might occur on the coast, as seen by the further submitters.

3.37 Without that further submission process, any new NZCPS could end up in an unsatisfactory state. For example, the Environmental Defence Society ("**EDS**") might be comfortable with certain new provisions in the publicly notified NZCPS, but then find that those very provisions are the subject of significant changes requested by some land developer where EDS considers those changes to be totally inappropriate. There will be no clear means for the EDS to bring its concerns about the implications of those changes to the notice of the Board of Inquiry. We would prefer to see the rights to make a further submission reinstated.

3.38 The Hon Peter Salmon QC then makes the good point that much better guidance for decisions on coastal subdivision development could be achieved, if the objectives and policies and rules of the relevant district and regional coastal plans were further developed, so that communities spelled out more clearly what categories of activities or types of development and their environmental affects might be considered appropriate in the coastal environment.

3.39 This is undoubtedly true. While there is probably nothing in the RMA preventing that happening, in the sense that more advanced and more helpful provisions in policy statements and plans can be developed now under the current provisions of the RMA, there are a wide variety of reasons why this is not occurring everywhere. This has been the subject of other conference papers and of EDS reports. There can be no doubt that most policy statements and plans are fairly broad brush and in such cases, developments are often considered by way of individual resource consent applications, on their merits.

3.40 There may be a combination of factors which need to occur to improve plans in the coastal environment. This may include more resources being applied depending on the area, perhaps by the Councils themselves but also perhaps by way of grants from Central Government or elsewhere if the local authorities lack the resources. Greater guidance could be given, if necessary, through the provisions of the NZCPS or through regional policy statements, so that the plans prepared under those documents then have to provide greater criteria for development activities. Better practice models can also play a real part in showing how high quality subdivision and development can be responsibly carried out. Here the Environmental Defence Society is helping to lead the way by its "Environmental Tick" concept. Councils could use those examples to build criteria into their plans to try and insist on similar quality developments being achieved in their areas, or at least look to those examples for guidance when processing resource consent applications.

3.41 Finally, we want to turn to the suggestion by Hon Peter Salmon QC that if the provisions of the Act itself were to be strengthened, then (page 4):

> It seems reasonably apparent that the preservation objective of Section 6(a) will be strengthened if the word "inappropriate" is replaced by the word "unnecessary".

3.42 While the author is undoubtedly correct that section 6(a) may well be strengthened by deleting "inappropriate" and reinserting "unnecessary", as it stood in the previous legislation, in our opinion there is a real question over whether that change itself is an appropriate one.

3.43 Accepting that the interpretation of the word "necessary" in this context may be read as "reasonably necessary", there was, in our opinion, a sound reason for the change under the RMA to the term "inappropriate".

3.44 An overriding factor behind the whole of the RMA reform was that it was no longer considered acceptable or necessary to focus to such a degree on the use or activity itself, and directing which uses could occur where, in terms of trying to "pick winners". Rather, there was to be a greater focus on environmental effects.

3.45 If any use would enable social and economic wellbeing, could be well-designed and have acceptable environmental implications through adverse effects being sufficiently avoided, remedied or mitigated, then potentially it would be an appropriate activity to take place.

3.46 Turning to the coast, this approach made the term "necessary" out of step. For example, while new wharves or reclamations for ports, or new inter-island ferry terminals, would generally have no difficulty with a criterion of having to be a "necessary" development, if the RMA was truly supposed to be effects based there should be no reason why a carefully designed subdivision and building of a certain number of residential houses on the subdivided lots, if they had suitable mitigation and planting etc, should not be able to be approved. Yet rarely could it ever be said that a house right on the coast is a "necessary" development. We have all seen excellent examples overseas and in New Zealand of responsible housing and tourist developments on the coast, and equally poor examples. But the key point is that few non-infrastructure activities, could easily fall within terminology such as "necessary".

3.47 The term "appropriate" was therefore deliberate, in order to allow a proper assessment of the environmental effects of the activity. Therefore rather than focusing on which particular use it is and whether that use is necessary on the coast, consideration was to be given to the effects and whether or not on an overall assessment, it is an appropriate form of development. If overall it were to be considered an appropriate form of development, then it was not considered essential (under s6) to preserve or protect the natural character of the coastal environment from it. The two could potentially sit comfortably together.

3.48 Therefore we would suggest that the term "inappropriate" should be retained in s6(a), but certainly as Hon Peter Salmon QC points out, there can and should be a greater focus in policy statements and plans on the types of things and effects that are considered appropriate in particular locations. The more this can be done, the greater the guidance for consent authorities when considering applications on their merits.

4. CONCLUSIONS

4.1 Globally effective coastal management has become an increasingly important issue, as countries face growing pressures on the coastal environment from ecological, recreational and commercial interests. In light of this growing pressure the regulatory frameworks used to manage the preservation, development and use of the coastal environment have come under increasing strain. As in New Zealand, coastal

management overseas has historically developed in a piece meal fashion, with the result that there is often numerous statutes involved and poor integration between governmental bodies responsible for various aspects of coastal management. In both countries examined, procedures were currently in place to consolidate management of the coastal environment by developing more integrated planning regimes.

4.2 Overall New Zealand, and the RMA, fared well when compared to the coastal management regimes of the Republic of Ireland and British Columbia. The RMA benefited from its "one stop shop" approach to coastal management, which lessened the potential for fragmented and uncoordinated approaches to coastal planning. However, as has been noted in this paper, further consolidation of the decision-making process and other improvements to the coastal regime in the RMA could be made to achieve "best practice", along with greater efforts made in planning documents initiated under the RMA to provide more guidance, with improved resources for that purpose if required. Examples of high quality subdivision and development on the coast should also be used to lift the standard as the Environmental Defence Society is seeking to do through its new “Environmental Tick” concept.

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