[redacted]

Set 2

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M. No 573/86

IN THE MATTER of the Town & Country Planning Act 1977

A N D

IN THE MATTER of an appeal pursuant to Section 162 of the Act from a determination of the Planning Tribunal

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

A N D MANGONUI COUNTY COUNCIL

First Respondent

A N D

M. No. 574/86

BETWEEN TAI TOKERAU MAORI DISTRICT COUNCIL

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

Hearing: 30 & 31 March and 1 April 1987

Counsel: G P Curry & P F Majurey for Environmental Defence Society Incorporated
Sian Elias for Tai Tokerau District Maori Council
P M Salmon QC & PA Fuscic for Mangonui County Council and Doubtless Bay Development Co Ltd
K Robinson for the Minister of Works and Development

Judgment 18 December 1987

JUDGMENT OF CHILWELL J

These appeals under section 162 of the Town and Country Planning Act 1977 (the Act) arise from the determination of the Planning Tribunal given under section 49 of the Act by which, subject to amendments, it approved of variations to the proposed reviewed district scheme of the Mangonui County Council (the Council) which provided for the zoning of land on the Karikari Peninsula for the development of a destination tourist resort to be called the Karikari Tourist Resort Zone. The appeals are directed at the interim decision of the Tribunal given on 3 February 1986 after a 6 day hearing in September and October 1985. The interim decision dealt with the substantive issues and was followed by a final order given on 24 March 1986 by which the Tribunal ordered and directed pursuant to the powers conferred by section 151(1) of the Act that Variations Nod 1 and 4 be amended in the manner recorded in a document containing the Scheme Statement, the Code of Ordinances and Planning Map A, a map portraying the Karikari Tourist Resort Zone.

According to the scheme statement the zone provides for the development of an integrated, self-contained, fully serviced tourist complex which is expected to cater for both domestic and international tourists and to contain a variety of accommodation, recreation, entertainment and shopping facilities. Counsel for the Council described it as a resort containing a wide variety of tourist accommodation ranging from camping grounds through low-cost accommodation to top quality hotels with a small commercial area to serve the resort and with recreational activities such as an international golf course and a riding trail.

For the background to the zoning I have drawn heavily and directly upon the first six pages of the Tribunal's interim decision. In 1978 the Council prepared a change to its operative district scheme introducing a policy statement in regard to tourist development on the Karikari Peninsula. The issue came before the Planning Tribunal on appeal in 1979 and its decision is reported as Burkhardt v Mangonui County Council (1979) 6 NZTPA 614. For present purposes it is sufficient to refer to the head note:-

> "A landowner represented to the respondent council that there should be a major new tourist resort on the Karikari Peninsula. His suggested development would accommodate 6,000 to 8,000 guests. No specific plans had been made. The council resolved to amend its Scheme Statement to indicate council's interest and to establish guide lines for investigations. The new provision also contained a commitment by the respondent council to undertake a further change or series of changes to the district scheme.

> "HELD: The respondent council was free to record by resolution (i) that it agreed in principle that there should be a major new tourist resort in its district; (ii) that in its opinion the Karikari Peninsula was the most likely place for such development; and (iii) the guide lines to be followed by those interested in promoting such development. However until studies had been completed and evaluated the location of the resort should be left open in the district scheme nor should the council commit itself to bringing down a change to the scheme for the benefit of a private landowner.
>
> The proposed change was altered as set out in the Second Schedule."

It is recorded in the decision that the Minister welcomed a statement encouraging tourist development in the North but opposed the identification of a particular locality or site for new tourist development until full studies had been completed; also that the Northland Regional Planning Authority did not oppose the identification of the Karikari Peninsula as a likely locality for a major tourist resort. The second schedule referred to in the head note authorised the Council to include in the scheme statement guidelines for tourist development and a list of the matters to be investigated and dealt with before the Council would consider a request that zoning provision be made for a new tourist resort in its district.

The Doubtless Bay Development Company Limited (the Company) is the owner of some 800 hectares of land on the Peninsula. It was interested in the new provisions in the district scheme because the suggestion that there should be a new tourist resort was made in relation to part of its land. It submitted a Development Statement to

the Council in support of a request for rezoning of part of its land in a way which would permit a tourist resort.

In September 1983 the Council recommended a proposed review of its district scheme. That document did not include zoning provision for a new tourist resort on the Peninsula. By January 1984 the Council was satisfied with the information which had been supplied to it. It resolved to vary the district scheme by including zoning provisions for a resort on the Peninsula. The variation (No. 1) was publicly notified in 1 May 1984. There were objections to the variation, including an objection from the Environmental Defence Society Incorporated (EDS). EDS sought that the variation be abandoned. After hearing the objectors, the Council resolved to disallow the objections that Variation No 1 should not proceed. It acknowledged that there was a need for additions and amendments to Variation No 1. It resolved to bring them in by way of a further variation. It, publicly notified Variation No 4 effecting the desired additions and amendments to the earlier variation. EDS objected to Variation No 4. The Council disallowed the objection. EDS appealed against the disallowance of both objections. It sought the abandonment of Variations Nod 1 and 4 and the deletion of all reference in the district scheme to the potential of Karikari Bay for a major resort/tourist development.

In the decision now under appeal to this Court the Tribunal stated that the Burkhardt decision did not

create any presumption in favour of the present zoning proposals; the decision specifically records that if in due course the Council were persuaded to initiate a change to the zoning of certain land, then that specific proposal could be evaluated in terms of the requirements of sections 3 and 4 of the Act. The Tribunal also stated, correctly in my view, that its function in respect of the 1985 appeals was to evaluate the zoning proposals then advanced, in terms of the requirements of sections 3 and 4.

The Karikari Peninsula separates Rangaunu Harbour (on the west) from Doubtless Bay (on the east). State Highway 10 lies along the base of the Peninsula. The turn-off from the State Highway is about 25 Kilometres from Kaitaia. The Peninsula was described in a report on a land use study conducted by the Department of lands and Survey in 1979:-

> "Karikari is, in many ways, a unique part of Northland. It combines qualities of remoteness and isolation with a regionally distinctive natural environment. The Peninsula is far removed from significant centres of population - Whangarei, the nearest large city lies 150 kilometres away. This isolation is enhanced by the rather poor quality of the access road, which acts as a deterrent to both visitors and prospective permanent residents. Karikari is surrounded on three sides by sea and the long coastline presents a constantly changing juxtaposition of bays, inlets, ocean beaches, shell banks, rocky headlands and cliffs, with numerous small, offshore islands. The land itself has been formed as a result of the complex action of ocean currents carrying sediments and depositing these to create a bridge of sand and silt between the mainland and a group of islands. The resulting terrain is predominantly

> low-lying swamp and scrub-covered sand, although the remnants of the islands in places reach a height of 185 metres. The combination of barren landscape and spectacular seascape produces an environment with outstanding scenic qualities rarely encountered elsewhere."

The Tribunal recorded that at the time of the 1981 census the number of people living on the Peninsula was about 300; by 1985 it may have been slightly more than that. The main settlement is at Whatuwhiwhi/Tokerau Beach North. There were in 1985 700 residential sites in that locality, of which 140 were built on. The zoning would permit about another 600 lots. There is a small Maori community and marae on the eastern side of Whatuwhiwhi; and a very small Maori community at Merita in the northern part of the Ngatikahu Block. Inland Road provides the only access to the Peninsular; in 1985 it was unsealed except for 1 kilometre from the State Highway.

The land affected by the appeals before the Tribunal and this Court is 15 kilometres from the State Highway and lies in an area bounded to the West by the Western End of Karikari beach up to about the Wairahoraho Stream where it crosses the beach and bounded to the East by Merita Bay Road. To the South West the land is immediately adjacent to the Whatuwhiwhi area.

As at 1985 there was no public access to Karikari Beach. There was an informal camping ground on the land of another owner at the northern end of the beach. People would gain access to the beach through the camping

ground. The Crown had recently purchased land further to the north, as public reserve. There was a large informal camping ground in the public reserve at Matai Bay, and another camping ground on Tokerau Beach. The proposed development required the construction of a new road on the slope below the Inland/Matai Bay Road (making a loop with that road). The construction of a spur road to the dunes behind the beach was also proposed.

The Development Statement submitted to the Council by the company indicated that development would take place in three stages. As defined in the Variations to the review of the district scheme, the scale and stages of development were to be:-

First Stage

One or more hotels to a total of 200 rooms

Four motels

One fully serviced camping ground to accommodate at least 200 berths (adjacent to the hotel/motel area).

An 18 hole international size golf course including club house facilities; and up to 200 tourist accommodation units adjoining the course.

An initial commercial development of at least one general store, one food shop, service station and Post Office facilities (in Commercial Development Area).

Provision of public access to Karikari Beach and other areas.

An equestrian centre.

Recreational facilities including squash courts, tennis courts and buildings for indoor recreation (in Commercial Development Area).

An initial development of beach services (in Beach Community Service Development Area).

Second Stage

Up to a further 200 tourist accommodation units adjoining the golf course.

Further facilities attendant to the golf course itself to be constructed such as extensions to the club house together with restaurant and conference facilities.

Construction of lake areas and up to 300 lakefront tourist accommodation units.

One tourist village to be constructed to accommodate some 300-400 tourist accommodation units.

Up to an additional six motels.

Extensions to the commercial centre to be carried out which will involve the building of further service shops, craft shops and additions to the existing retailing set-up.

A further camping ground.

Extensions to the equestrian centre and other facilities for the riding school.

One or more hotels of a room total not exceeding 200 rooms.

Further development of beach services (in Beach Community Service Development Area).

Third Stage

A further camping ground.

Up to a further 300 lakefront tourist accommodation units.

Additional tourist village of some 300-400 tourist accommodation units.

Additional facilities of a recreational nature to be installed where appropriate either by the commercial centre or adjoining the existing hotel facilities.

Up to one or more hotels of a room total not exceeding 200 rooms.

The Scheme Statement recorded that for the purposes of utilities planning, the approximate capacity "visitor population" generated by the development would be:-

Stage 1	2,280		2,280
Stage 2	4,840	(Amended to:	4,240
Stage 3	3,560		2,960
TOTAL	10,680		9,480)

The then population of Mangonui County and Kaitaia Borough was stated to be approximately 14,500.

At the time of the Tribunal hearing the zoning of that part of the Company's land within 800 metres of the coast was Rural C. The balance of its land was zoned Rural A. The operative Scheme Statement said that the objective of the rural C zone was "to provide for the conservation of the coastal environment by applying design criteria to promote harmony between proposed buildings and their natural surroundings ... and by excluding incompatible uses". The Rural A zone was the general rural zone. Among the uses permitted in the Rural A zone were motels, hotels and camping grounds; those uses were not permitted in the Rural C zone.

Variations Nod 1 and 4, provided for 288 hectares of the Company's land to be rezoned other than as Rural A, C or E. That 288 hectares included the proposed golf

course and a proposed artificial lake. The golf course area is approximately 77 hectares. Some accommodation was proposed on the golf course land. The proposed lake was to have an area of approximately 58 hectares.

Most of that land was to be included in a "Karikari Tourist Resort Zone". The code of ordinances stated:-

> "This zone, which is comprised of a number of dispersed development areas, provides for the redevelopment of tourist accommodation and services for an integrated, self-contained, fully serviced tourist resort. In order to ensure that the objectives and policies relating to environmental considerations are adhered to, all permitted uses will be controlled uses."

Part of the Company's land was to be rezoned Rural E, a special zone to provide for the treatment and land disposal of sewage. The remainder of its Rural A land affected by the Variations was to be rezoned Rural C.

For the purpose of its decision the Tribunal identified three distinct parts of the Company's land.

1. The beach and foredune area of Karikari Bay.

2. An extensive swamp and wetland area behind the foredunes, and river flats at the Eastern end.

3. Higher scrub-covered land rising behind (2) (i.e. away from Karikari Bay).

The Tribunal approached its task with the observation that in allowing or disallowing the appeals it had to apply the provisions of sections 3 and 4 of the Act to the circumstances of the case.

The Tribunal noted that counsel for EDS had defined the essential issues in this way:

1. Is there a clearly demonstrated need for a tourist resort development in the district?

2. If such a need is demonstrated, is the Karikari peninsula a suitable location for a tourist resort development?

3. Is the content, and are the procedures proposed by, the Variations appropriate?

The statement of the first two issues was not accepted. The Tribunal concluded that these two questions (to a degree inter-related) would be better formulated.:

1. Is there justification for making zoning provision for a new tourist resort?

2. If so, is the company's land a suitable location for it?

That was the first determination given in the decision. The second related to section 3(1)(b) viz "the wise use and management of New Zealand's resources". The Tribunal noted that those who supported the Variations did not adduce any evidence to establish that there is anyone with the financial resources ready and willing to undertake the development should the Variations be upheld. It appears that counsel for EDS had argued that in the absence of such evidence there was no basis for a determination of the question whether or not the proposal would represent wise use and management of resources. In ruling against that submission the Tribunal affirmed rulings given in other decisions that the subsection speaks principally of the wise use and management of land resources. In the present case the Tribunal said:-

> "The question before us is whether it would be wise use and management of the land affected, to allow it to be put to the purposes proposed in the Variations. If it is to be put to those purposes, then other resources will be required to develop the land. Where those resources will come from, indeed whether they will be available, are not questions which land use planning can examine. So that while land use planning must examine questions of need, zoning can only provide opportunities; and it does not necessarily follow that opportunities will be taken up. We accept that if the Variations are sustained, it will be necessary for those interested to carry out feasibility studies before deciding whether to commit themselves to develop the land in accordance with the zoning." (page 12)

The third determination was that a destination resort developed in accordance with the Variations would have regional and national significance even if developed

only to Stage I. Section 22 of the Act required account to be taken of the provisions of the "Northland Regional Planning Scheme : Principal Section" approved by the Northland United Council. Because the aims and objectives of that scheme were too generalised the Tribunal found them of no help. The United Council took no part in the hearing but had been involved in the examination and debate which preceded the introduction of the Variations.

The fourth determination, which was expressed to have been reached after weighing the whole of the evidence and submissions, related to the first two essential issues previously mentioned. The Tribunal concluded that, applying the requirements of sections 3 and 4, there was justification for making zoning provision for a new tourist resort, to the extent of Stage I, as defined in the Variations, and that "in land use planning terms" the land proposed to be rezoned for Stage I is a suitable site for it. In amplification of those conclusions the Tribunal said:-

> "We are persuaded by the evidence that there is a place for such a destination resort in new Zealand tourism and that it should be in Northland. For the purposes of this decision we have had to presume that it is not possible to attach a destination resort to an existing tourist community in Northland. (The appeal process is just not apt to make a wide-ranging inquiry into an issue of that kind.) Those supporting the Variations assured us that that is so. Nothing advanced by the appellant caused us to question that assurance.
>
> The promotion of a new destination resort involves a very considerable risk; as we said, market demand and support must be generated. If

> a sufficient degree of new market support is not generated, it could have an adverse effect on the existing tourist infrastructure. but we have been persuaded that land use planning should give the opportunity for someone to take that risk if their market research indicates that it is justified. And no one from the tourist industry opposed the Variations." (page 14)

The next reference was to social and economic benefits. The Tribunal said that the Council held the view that the proposed development will confer those benefits on the district in particular by relieving unemployment and reducing out-migration. The Tribunal accepted a passage in the evidence of a planning consultant called by the company who is involved primarily in social planning and research:-

> "Northland and Mangonui County Council have suffered for years from severe unemployment. Pastoral farming and fishing are in decline. Horticulture and forestry hold out long term promise for employment development in the area but these sectors are unlikely to meet the needs of the unemployed in the area. The economy must diversify and look to labour intensive opportunities. Tourism does not guarantee local jobs nor the protection of the natural environment or the economic and cultural well-being of the area's substantial Maori population. However, if well planned and with broad based local participation and control, tourism may substantially reduce local unemployment and under-development. Few alternative opportunities are apparent at this time."

That evidence provided the basis for the fifth determination of the Tribunal (supportive of the fourth) which was that the foregoing evidence is an appropriate summary of the general situation and that (subject to the qualifications mentioned by the witness) tourism, and in

particular a new destination resort, may significantly reduce local unemployment and under-development:-

> "The possibility that it will have those beneficial consequences on the district has weighed heavily with us in coming to the conclusion that land use planning should give the opportunity for someone to develop such a resort, to the extent of Stage 1. (However, we repeat that it is only a possibility that a destination resort will have beneficial, social and economic effects on the district in general and on the local community in particular. A resort could be successful from the developer's point of view yet unsuccessful in terms of it effects on the district and community. We have something more to say about this later in this decision.)" (pages 14 and 15).

The sixth determination, supportive of the fourth in relation to the second essential issue, was that the Karikari Peninsula is a suitable location for the proposed tourist resort:-

> "There is no doubt that the Karikari Peninsula is an area of high scenic quality. It has several beaches, with different characteristics, and an attractive coastal environment, In New Zealand terms it has a congenial climate. That climate would not be sufficiently warm year round to sustain a destination resort based solely on the use of beaches. from a tourist and holiday point of view the existing natural attractions of the peninsula could be complemented by the development of land-based participatory recreational activities. The peninsula is well situated to allow day excursions to other places of tourist interest.
>
> We are satisfied that in terms of the natural environment which exists there and the micro-environment which could be created for tourists and holidaymakers, the Karikari peninsula is a suitable location for a destination resort of the kind put forward by those supporting the Variations." (page 15)

In support of that part of the fourth determination that the land proposed to be rezoned for Stage I is a suitable site the Tribunal noted that tourism does not guarantee the protection of the natural environment; it can be destructive of it. Reference was made to section 3(1)(c) which stipulates, as a matter of national importance, the preservation of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development. The Tribunal stated that the subsection does not require land use planning to give absolute protection to the natural character of the coastal environment; if it did there would be no subdivision or development at all in that environment. The Tribunal referred to the three distinct parts of the company's land previously described and expressed the opinion that the beach and foredune area and the swamp and wetland area are very important from an environmental view point. The seventh determination, a composite one, was:-

(a) "All the company's land is in the general coastal environment." (page 15)

(b) "... the beach and foredune area is such an important part of the coastal environment that it would be quite contrary to the requirements of section 3(1)(c) to permit any development within it other than beach related facilities." (page 15)

(c) "The swamp and wetland area is physically not suitable as a site for tourist and holiday accommodation and in any event has its own claims to preservation in its natural state on environmental grounds."

(d) "... the third area, the higher scrub-covered land. We find and hold that

that area is a suitable site for a destination resort for the following reasons:-

(i) It is sufficiently far from Karikari Beach that development of tourist and holiday accommodation can be carried out in a manner which is subservient to the landscape and which substantially preserves the natural character of the coastal environment. That part of the company's land does not have an untouched or remote character.

(ii) It allows participatory activities such as golf and horseriding to be sited adjacent to the accommodation.

(iii) To a degree it relates the development to the existing settlement of Whatuwhiwhi/Tokerau Beach, and it allows the resort to be related to all the beaches at the northern end of the peninsula rather than just to Karikari Beach." (pages 15 and 16)

The eighth determination, again supportive of the fourth in relation to the second essential issue, was that the zoning provision for Stage I on the company's land was justified and that the district scheme should not, as was proposed, contain any commitment to authorising later stages. The reasons given for the latter part of the determination were:-

(i) "We accept that a destination resort must be of a certain minimum size to be viable. The evidence was that Stage 1 can stand alone. Indeed the Variations would be of no use to the company and the tourist industry unless that were so." (page 16)

(ii) "Market demand and support for a destination resort must be generated, and a new resort will inevitably affect the existing market to some degree. The Variation documents acknowledge that the likely demand for development cannot be

[illegible] with complete accuracy, and that [illegible] may be necessary to adjust the sequence of development from time to time. We have concluded that because of the scale of the project to its third stage, the size of the investment involved and the inherent uncertainties, it would be wrong to give any commitment now that zoning provision will be made for any later stage of the proposal. We have further concluded that there should be no commitment to adjust the sequence of development, particularly by authorising part of Stage 2 before Stage 1 is complete. To do so may alter the character and purpose of the development, for instance by turning it into a conventional holiday resort. There is ample scope for conventional development at Whatuwhiwhi/Tokerau Beach." (Page 16)

(iii) "We have already quoted from the evidence of a planner who is involved primarily in social planning and research. In his evidence he went on to say that to achieve an appropriate and sustainable development, tourism on the Karikari peninsula must:

(1) proceed in stages based on the achievement of locally defined development objectives;

(2) promote local ownership and control of resources and participation in decision making at all stages of development;

(3) provide opportunities for training and skill development appropriate to the area's resources and the aspirations of local people;

(4) enhance opportunities for social interaction, recreation and cultural development;

(5) proceed in a manner which facilitates comprehensive development rather than ad hoc, spot development of the type currently evident throughout Northland;

(6) facilitate the injection of needed capital, managerial and entrepreneurial skills into the area by way of co-operation between the

local community, the private sector, Government Agencies and Maori interest groups;

(7) ensure the protection and enhancement of the environment, local community life and the role of the Ngati Kahu as protectors of the waahi tapu and Kaimoana."

We accept and adopt that statement. The development which would take place under Stage 1 would accommodate about 2280 people. The present population of the peninsula is only a few hundred. The social environment on the peninsula will inevitably change as the Whatuwhiwhi/Tokerau Beach settlement grows - we have already mentioned that under existing zoning there is the capacity for about 1300 sections. But Stage 1 would add a massive and abrupt dimension to growth on the peninsula. Change can be overwhelming and destructive by its mere size. We have concluded that commitment to the change inherent in Stage 1 is all that the existing community can reasonably be asked to contemplate and accept. Indeed if there is no commitment in the district scheme to later stages of the development, we are of the opinion that Stage 1 will have a greater chance of success with the local community in social and economic terms." (pages 16 & 17)

(iv) "One of the principal objectives of (EDS) is the preservation of the natural, wild and remote character of Karikari Beach, and its protection as a wildlife habitat. That could only be fully achieved by the acquisition of the beach and dune area by some public agency and the exclusion of the public from a large part of it. In the past people have made little use of the beach; there has been no public access; access has been by courtesy of private owners. But that situation is changing. The Crown has recently acquired land at the eastern end of the beach for a public reserve; and it appears likely that in the future the Crown will facilitate access to the beach over Crown land at the western end of the beach. It is inevitable that use of Karikari Beach by the public will increase. However, overuse will damage the environmental qualities of the beach and dune area and

seriously affect its value as a wildlife habitat. Also the beach and dune area has particular significance to the Maori people and contains a number of archaeological sites. There is need to manage the beach and dune area in a way which will protect environmental and wildlife values, and to that end to limit the use made of the beach. There is no way in which the number of people using the beach can be directly controlled; but that number can to a degree be indirectly controlled by limiting development in the vicinity of the beach. We have concluded that the due protection of environmental and wildlife values in the beach and dune areas requires that there be no commitment to development of a destination resort beyond Stage 1." (pages 17 & 18)

"... on the subdivision of its land the company would be required by section 289 Local Government Act 1974 to vest an Esplanade Reserve not less than 20 metres in width. Recent changes in the law have the effect that the respondent cannot require an Esplanade Reserve of greater width, though the company could offer such. This is a case where an Esplanade Reserve of very substantial width is desirable if adequate protection is to be given to the foredune area and to the rare flora and fauna found therein.

We have no power to direct that the beach and dune area be vested as a public reserve or to direct that a public agency acquire that land. But we record that in the course of the hearing of the appeals the company offered to enter into a conservation covenant under section 77 Reserves Act 1977 in respect of that land and consented to an amendment of the zoning documents in a way which would require that no development shall proceed until such a covenant has been executed." (page 18)

[I observe that the scheme statement approved by the Tribunal when it made its final order provides that the beach and dunes area is to be kept free from development and to be protected by a section 77 conservation covenant and "then become progressively set apart as a Public Reserve in the future as development of this resort proceeds and Reserves Contributions are assessed." The approved

> local community. A district scheme can only define the nature and form of development; it cannot define the steps to be taken to ensure that there will be beneficial, social and economic effects on the community. The respondent is aware of that limitation. It has recorded in the Variations its intention to set up a "Karikari Advisory Sub-committee" and a "Karikari Joint Committee of Management". The functions of the Sub-committee will be to monitor the impacts of the development. The function of the Committee of Management will be to deal with the functioning of the resort and its integration with community; that Committee is to have representatives of the Council, the developer, the resort operator, the Ngati Kahu people and the local community.
>
> The respondent's intention to set up those bodies is, in the circumstances, very commendable. (We suggest that there should be at least two of the Ngati Kahu on the Joint Committee). It is apparent to us from the evidence that the company has raised high expectations in the minds of a section of the community as to the beneficial, social and economic consequences which the community will enjoy from the development. Although the Joint Committee will have no statutory powers, the developer and resort operator would be wise to heed the recommendations of that Committee and to organise their operations in a way which integrates those operations with the local community." (pages 20 & 21)

In the scheme statement and code of ordinances approved by the Tribunal when it made its final order provision has been made for the establishment, membership and functions of the two committees.

The questions to be resolved by this Court appear roughly to fall into three principal categories. The <u>first</u> is whether the Tribunal had evidence upon which it could reasonably conclude that "there is a place for such a destination resort in New Zealand tourism and that it should be in Northland". The <u>second</u> is concerned with the

interpretation and application of sections 3 and 4 of the Act. The third is concerned with the function of the Tribunal in hearing and determining appeals of the present type.

The limited role of this Court in hearing and determining an appeal confined to errors of law is well known. The general principle is that the Court can interfere with the Tribunal decision only if it has applied a wrong legal test or if it has come to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come, or if it has taken into consideration matters which it ought not to have taken into account or if it has failed to take into consideration matters which it ought to have taken into account. Ashbridge Investments Ltd v Minister of Housing etc [1965] 3 ALL ER 371, 374. An expert tribunal, such as the Planning Tribunal, ought to be given some latitude to reach findings of fact which fall within the area of its own expertise even in the absence of evidence to support such findings and some latitude in reaching findings of fact made in reliance upon its own expertise in the evaluation of conflicting evidence and some latitude in reaching conclusions based on its expertise without relating them or being able to relate them to specific findings of fact but care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted. "Error of Law or Error of Fact" by Dr Geoffrey A Flick (1983) 5

W.A.L.R. 193, 204-205 and Lynley Buildings Ltd v Auckland City Council (1984) 10 NZTPA 145, 160.

Was there evidence upon which the Tribunal could reasonably conclude that there is a place for such a destination resort in New Zealand tourism and that it should be in Northland?

I was referred to and have read 305 pages of evidence which was part of the evidence before the Tribunal. It comprised the evidence of the witnesses Jones, Rollinson, South, Cooper, Mahony, Putt and Hayman. Mr Jones is a planning consultant in private practice engaged by the Council to advise upon the scheme variations. Mr Rollinson is an employee of Air New Zealand Ltd holding the position of Marketing Profitability Analyst. Mr South is a chartered accountant, a partner in an Australian firm which specialises as world wide consultants to resorts, hotels, the tourism industry generally and other leisure time industry pursuits. Mr Cooper is the managing director of Mt Cook (Northland) Ltd, part of the Mount Cook Group which is engaged in tourist transport. Mr Mahony is a planning consultant in a private practice engaged by the Company. Mr Putt is a senior planner employed by the Ministry of Works and Development in Auckland and Mr Hayman is the director of the Development and Advisory Division of New Zealand Tourist and Publicity in Wellington. His responsibilities during the four years

prior to the hearing by the Tribunal were to facilitate and co-ordinate the development of New Zealand's tourism industry and in particular to advise on the development of the appropriate tourism product to meet market demands.

Counsel for Tai Tokerau referred me to certain passages from the evidence of those witnesses with the exception of Mr Cooper. Based on those passages she advanced the powerful submission that the evidence before the Tribunal relating to the place for a destination tourist resort fell far short of establishing that there is a place for a destination tourist resort of the type envisaged or that it should be in Northland. She submitted that the passages to which she referred resulted in the following evaluation of the evidence.

> "The beach is not essential to the development.
>
> The concept is an entirely new one for New Zealand.
>
> The concept requires forceful marketing in order to generate its own demand.
>
> It will be dependent upon a large proportion (50% to 70%) of overseas tourists for whom a destination coastal resort in a setting which is not tropical will be a new concept.
>
> No marketing studies have been obtained of the potential demand for such a facility.
>
> No feasibility studies of the development (to ensure competitive costing) have been done.
>
> A destination tourist resort requires to be of a minimum size if it is to achieve its purpose of being able to provide for a range of day time and night time activities. The evidence was that the minimum size would be 2,500 to 3,000 people accommodated. Stage I which is all that is approved will accommodate a maximum (if fully developed and occupied) of 2,280.

The project at Karikari is ideally suited to meet these purposes, and the attractions of the Northland beaches and water facilities are an essential ingredient. Just as we have found Queenstown in the South Island has generated business both from overseas and within N.Z. domestic market, we see like facilities in Northland having the same appeal, if not in greater degrees, as a year-round resort facility. Every new resort is a very good thing from our point of view, because it is another place to which we can fly people."

Mr South pages 120 to 121

"The number of international arrivals to New Zealand is on an unprecendented upswing and the Asian/Japanese markets are exhibiting particularly strong growth. The domestic travel market is many times larger than the international component both in terms of tourist numbers and expenditure. Northland features prominently in domestic tourism visitation. Given these market trends, the outlook for growth in the tourism industry in New Zealand is favourable and the potential for capitalising on current Australian marketing successes is largely untapped.

The Northland region of New Zealand is a relatively sparsely populated physically unique portion of the north island. Its predominantly agriculture based economy has experienced an indifferent economic history. The prospect of large scale tourism is not only especially attractive but can be accommodated with relatively little disruption."

Page 159

"There is no other true destination resort of the magnitude or standard proposed for Karikari Bay existing or planned within the country. This proposed development presents an opportunity for the first time in New Zealand to promote tourism on a regional basis. The site is excellently located for visitors to undertake day trips to other well known areas of the Northland region such as Cape Reinga, the Bay of Islands, Ninety Mile Beach and other areas of historical or scenic value. The proposed development has the potential to become the hub of a regional sphere of visitation activity."

Page 164

"I consider stage one presents a package which will be marketable and sustainable in its own right."

Page 169

"It is considered, given the stated favourable attributes of the Karikari site, the range of facilities proposed and currently, a tourism market within New Zealand which appears to be facility constrained, market demand for the Northland resort will emanate from the segments outlined in the following paragraphs."

Pages 178 - 179

"Given the previously identified attributes of the proposed project including:

The unique nature, scale and design of the proposed facilities.

The natural attraction differentiation size and expansive nature of the site.

The prevailing temperate climate of the location.

The relative ease of access with proximity to international gateway.

Local support and potential economic benefit for the region.

I am of the opinion the project will satisfy demonstrated need and will generate substantial market demand and support particularly within identified sectors, as follows:

The Group Inclusive tour and the Free Independent Traveller.

The conference and meetings market.

The incentive travel market.

Special interest groups.

Daytrippers from and to the resort.

Condominium investors."

Mr Mahony page 205

"The recognition in the mid 1970's of the growth in the Tourism Industry and the importance of its

role in the New Zealand economy prompted investigations into the desirability of developing tourist destinations complementary to the traditional centres of Rotorua, Taupo, Mt Cook and Queenstown. These investigations carried out independently by New Zealand's then two major airlines and private investors and developers eventually focused on the Far North as being the region having the potential in which to establish an extra dimension to the existing tourist circuit. The climate, beaches, coastal scenery, native forests and historical places of the Far North offered the opportunity to provide a destination resort of a more complete nature than most of the existing centres."

Page 208

"From the brief facts given above it can be seen that tourism is already playing an important part in the New Zealand economy but if Central Government's policy of expansion is to be satisfied, I believe that it will be necessary to provide for more opportunities for tourists to fully enjoy a holiday in New Zealand.

Some expansion of existing locations will be possible and desirable but I believe that to fully realise the potential of the tourism industry there is a need to establish new locations providing for destination tourist resorts."

Page 209

"One of the problems is that large scale entertainment and recreational activities are sustainable only where there are large numbers of people, and people will come only if facilities are available for their enjoyment. Most existing resorts in the North experience a peak period at Christmas when the weather is good, the beaches can be fully enjoyed, and visitors attract more visitors but there is a marked decline at other times of the year. What is needed is recreational and entertainment facilities of a type which will attract people on all the year round basis."

Mr Putt page 252

"It is clear that the development represents a new concept to New Zealand tourism and as such existing demand and tourist growth patterns are not particularly instructive. They simply portray current market activity based on an existing infrastructure and the confident backdrop those figures provide. I am advised by

the Tourist and Publicity Department that there is a role for such destination resort developments in New Zealand tourism. It is appropriate therefore, as a corollary, that planning provision be made for such facilities. From the investment viewpoint the developer is clearly accepting that the proposed Karikari development is not demand led but is relying on a strategy of supply and marketing.

Also relevant to need is the particular dimension that this development has: the single destination tourist resort hotel and its related facilities. Without this dimension there can be no need for the development since the vacant residentially-zoned land in the vicinity, from Whatuwhiwhi to Coopers Beach, can provide for many years of traditional coastal development. Without the hotels, etc, the proposal would be just another coastal development, albeit up-market in character, and would fail to answer the test of need.

To conclude the discussion on need I consider that it is not possible to say there is no need for such a tourist development but rather that there is a place in the tourism development of New Zealand for one or two such resorts. The special character of such resorts means that the planning system cannot readily anticipate them and give categorical direction on their siting. Rather planning must be able to respond to initiatives and balance the development impetus with conservation management."

Page 253

"The project must be viewed from a New Zealand perspective and as such climatic conditions, water temperatures, landscapes and so on all join to present a recreation environment at Karikari which has merit in its own right and which need not be compared, for example, with Fiji or any other tropical resort developments. There are no assumptions that I have read from the developers or the County that give any illusions of comparability on this matter. The site need only be judged for suitability in New Zealand terms.

In examining the urban zones of the County and the upper half of the Northland region I conclude that there are no existing areas into which a development of the scale proposed might fall. Inherent in the concept of a comprehensive tourist destination resort is the proviso that a currently uncommitted/undeveloped area be located and available. Karikari provides such a site. I would note that there is no guidance on these

matters contained in the proposed Regional Scheme."

Pages 261 to 262

"A particular difficulty with the proposal remains the question of whether such a development is needed at all. On balance, my opinion remains that the answer is yes, but with reservations about the remoteness of the location and the likelihood of investment which can only be tested by market forces. These points aside, I believe that the proposed use is a valid one which the planning system is obliged to provide for in a suitable manner."

Mr Hayman page 287

"The Department's and my view is that while destination resorts will not become the predominant New Zealand tourism attraction, nevertheless there is likely to be a place for such facilities in an expanded New Zealand tourism product range. There is a market segment overseas that New Zealand is currently not catering for."

Page 289

"Turning now specifically to the subject of a destination beach resort it is my view that such a facility is likely to be a desirable addition to our product range and that Northland has a better claim than most. It has a warm climate and reasonable proximity to our major international airport and a large domestic market."

Pages 289 to 290

"I believe that Northland would attract additional visitors, especially international visitors, if it had more facilities like a beach resort, to compliment the inherent attractions of a warm climate, outdoor recreational opportunities and the many historical, cultural and scenic points of interest.

Having concluded that there is a place for a destination resort in Northland, I shall now address what type of resort it should be."

Section 3(1)(a)

"The Conservation, protection, and enhancement of the physical, cultural and social environment."

Although the Tribunal did not make express reference to subsection (a) its decision is replete with references to the physical environment and concern for its conservation, protection and enhancement.

So far as the cultural environment is concerned, it is sufficient to point to references in the decision to population and location of various communities on the Peninsula. The Tribunal noted the massive and abrupt dimension to growth on the Peninsula if Stage I proceeds. It considered a zoning commitment to Stage I to be the limit which the existing community could reasonably be asked to accept. The Tribunal applauded the concept and proposed functions of the two committees. Its recommendations have been given effect in the scheme statement and code of ordinances approved by the Tribunal.

A reference to the social environment is found in the extract from the evidence of the social planner (supra) who referred to local unemployment and expressed the opinion, given certain conditions, that tourism may substantially reduce local unemployment and under-development. That evidence was accepted by the Tribunal which carries the implication that it also accepted evidence from other witnesses for the Council on the topic:-

> "The respondent sees the development of a destination tourist resort on the Karikari peninsula as the only available solution to the severe unemployment problems of the district and as a counter to the out-migration of its young people. The district is already receiving some benefit from conventional tourist traffic. But the respondent sees a destination resort as adding substantial year-round benefits to its district. It led a considerable body of evidence laying before us the problems of its community and the hopes which various sections of the community have of the benefits which would flow from such a development." (pages 9 and 10)

It is clear that the Tribunal was fully aware of the impact of the proposed development upon the local community and also aware that it could solve a real economic problem.

Dealing more generally with subsection (a) Mr Putt, giving evidence for the Ministry of Works and Development, said (page 261):-

> "In dealing with S.3(1)(a) I am satisfied that the planning process of checks and consultation provided through Variation 4 has achieved a desirable level of conservation, protection and enhancement consistent with this matter of national importance. Given the requirement of certainty in the New Zealand planning system, it would be difficult in my opinion to provide for a development of this nature with any better planning techniques."

Counsel for EDS contended that the Tribunal, by holding that it was only a possibility that a destination resort would have beneficial social and economic effects on the district, had failed to take into account the imperative language of the subsection. He submitted that unless the Tribunal could judge the actual benefits

(especially economic benefits) to be derived from the proposal and compare them with any likely costs such as environmental, cultural or social degradation, it could not be said that there had been conservation, protection, and enhancement of the physical, cultural, and social environment. He submitted the proposed zoning should have been declined unless the evidence established that the possible benefits outweighed the possible costs in terms of the physical, cultural and social environment. He observed that the Tribunal had indirectly carried out this analysis when it found that the consequences of a destination resort may not be beneficial, that it was only a possibility that a destination resort would have beneficial social and economic effects, and that a destination tourist resort could be successful from the developer's point of view yet unsuccessful in terms of its effects on the district and the community. Counsel argued that the Tribunal could not have given proper weight to the conservation, protection, and enhancement of the cultural and social environment when it determined that the consequences of a destination resort may not be beneficial and that it was only a possibility that a destination resort would have beneficial social and economic effects. He contended that a mere possibility that a proposal will have beneficial social and economic effects does not take into account the direction in section 3(1)(a); at the very least there should be a probability.

The precursor to section 3 was section 2B of the 1953 Act which was added by an amending enactment in 1973. It provided that certain matters be "declared to be of national importance and shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes". The precursor to section 4 was section 18 of the 1953 Act which, in a general way, is similar to section 4. The judgment of Wild CJ in Minister of Works v Waimea County [1976] 1 NZLR 37 concerning the weight to be given to section 2B and section 18 matters has stood without question since 1975 and has frequently been applied by the Tribunal both before and after the coming into force of the 1977 Act. Wild CJ said (at 382):

> "The object and scope of s 2B is perfectly plain both from its place in the scheme of the Act and also from its language. It is to be read together with and deemed part of the Act, and it is noteworthy that it was inserted at the beginning of the Act, after the short title and the two sections dealing with interpretations and the liability of the Crown. It precedes part I which deals with regional planning schemes and part II which deals with district schemes. Apart from the clear indication in the insertion of s 2B in that position in the Act, the section itself declares in terms that the three topics it prescribes "shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes". That means just what it says. It follows that every council and every appeal board or other authority acting under the Act must do what s 2B requires. But s 2B must be read with all other provisions because the Act must be read as a whole. Section 18, which opens part II of the Act, declares what shall be the general purpose of every district scheme. In the same way s 2, which opens part I, declares what shall be the general purpose of every regional planning scheme. Authorities acting under the authority of the statute in regard to regional planning

> schemes or district schemes must, therefore, have regard to s 3 or s 18 as the case may be.
>
> All this is made clear in the statute itself and it is the answer to the issues raised in this case stated. There is really no more to be said: Parliament required the board to act accordingly in every case according to the circumstances and upon the facts before it.
>
> The form of question (1), as propounded in the case stated, is hardly satisfactory in that it does not admit of a clear affirmative or negative answer. If the board is asking whether it can base its "finding" on s 18 alone, ignoring s 2B, the answer is "No". On the other hand, the board would also be wrong to provide only for the topics mentioned in s 2B and put out of its mind the general purpose set out in s 18. It is not a matter of "weigh[ing] the effect of both sections" as stated in question (1), but rather of weighing all the facts and circumstances and applying the sections. This is a matter of judgment for the board bearing in mind its powers, duties and functions as set out in s 42."

Implicit in the arguments of counsel for EDS is that the 1977 Act gave greater weight to section 3 matters than had previously been the case thereby effectively overruling the interpretation of Wild CJ and giving primacy to section 3 matters. See 1 Palmer Planning and Development Law in New Zealand 202. There is support for that view in that sections 4 and 36 are expressed to be subject to section 3 whereas their precursors were not expressly made subject to section 2B. I accept the submission of counsel for the Council that the 1977 Act achieved no more than to make explicit what was previously implicit. The declaration in the 1973 amendment that certain matters were of national importance gave those matters a degree of emphasis no less than in the 1977 Act. I agree with the opinion of the Tribunal in Smith v Waimate West County (1980) 7 NZTPA 241, 259 that section 3

must be read in the context of the Act as a whole. In that case the Tribunal adopted (at 259 to 261) albeit by way of obiter dicta, the submissions of counsel, Mr I L McKay, on the interpretation of section 3(1)(b). In particular at 260 the Tribunal adopted as correct Mr McKay's submission upon the application of the judgment of Wild CJ to the 1977 Act:-

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

That interpretation has been adopted and applied by the Tribunal consistently since 1980. This is the first attempt of which I am aware to advance a contrary interpretation. Not only has the Tribunal's interpretation stood the test of time it also seems to me to be clearly correct. To give section 3 matters the absolute primacy contended for would be to provide a jurisdictional bar to much development. It is a planning enactment and not a status quo enactment. Speight J said in EDS v Mangonui County Council (unreported; 23/10/81; M. No. 101/81; Wellington) at 9:

> "Section 3 does not call for the impossible - the preservation of New Zealand in pristine virginity."

Also as 260 of Smith the Tribunal adopted the following further submissions of Mr McKay which are material to the present case:-

"3. The meaning of "recognised" and "provide" can be judged by looking at other paragraphs in the section such as (c), (d). Subsection 1(c) relates to the preservation of the coastal environment and has the qualifying word "unnecessary". The earlier part of the subsection is expressed without qualification. It is clearly not an absolute prohibition otherwise one could never build a marine outfall. Subclause (d) relates to land of high actual or potential value for the production of food. This is a desirable objective which is to be given full weight and importance, but was never intended as absolute. The whole section is not to be read as a section relating to absolutes, but important factors to be taken into account with everything else.

(4) The words "recognised" and "provide" (s3) do not mean that where any of the listed matters fall to be considered other considerations are to be excluded or cease to be of importance.

(5) "Recognised" in this context requires no more than that there by an awareness of the listed matters and consideration of them. A relevant meaning amongst those from the Shorter Oxford Dictionary is "treat as entitled to consideration" and from Webster's Dictionary "to take notice of".

(6) "Provide" in this context means to "allow for" to make possible in the context of the district scheme". The Oxford gives a definition "to make due preparation", "to make provision".

(7) Hence the section requires that a district scheme be so drawn up and administered as to take notice of and make provision for the wise use and management of resources. That is to enable and permit resources to be wisely used, not to determine or direct that they shall be so used.

(8) The section is directed to the district, regional district or maritime schemes as a whole. In preparing its scheme the Council must include the appropriate provision. In administering the scheme and dealing with individual properties the Council must ensure that its decision still leaves the district scheme as a

> whole as a scheme that allows for the wise use of resources.
>
> (9) The section does not give to a council the responsibility of determining priorities as between uses. There may be options within the concept of wise use e.g. either an ammonia-urea plant or farming. The requirement to recognise and provide for wise use, even if it applies to an individual property and not to the scheme as a whole, does not require a determination of "wisest or best possible use"."

Subsection (b) was at issue in that case. However the principle expressed in paragraph (7) would apply to subsection (a) so that it is appropriate to find that the section also requires a district scheme to be so drawn up and administered as to take notice of and make provision for the conservation, protection, and enhancement of the physical, cultural, and social environment.

Reported decisions of the Tribunal show that in weighing up the matters to which its attention is directed by sections 3, 4, 36 and other sections it adopts a balancing exercise between conservation and development and between public and private advantages and disadvantages of the particular land use under investigation. The balancing exercise relates to competing considerations within the matters to which each section relates and to competing considerations as between each material section. Counsel for the Council referred to Native Forest Action Council v Kaikoura County (1978) 6 NZTPA 492, Arawa Maori Trust Board v Rotorua County (1979) 6 NZTPA 520 Remarkables Protection Committee v Lake County

(1980) 7 NZTPA 273 and Hooker v Waitemata City (1979) 7 NZTPA 38. There are many more reported decisions in which the balancing exercise can be seen in operation. the Tribunal has frequently observed that in this process a value judgment is required. It is indeed the value judgment of an expert tribunal acting within the limits of its expertise. It is difficult to comprehend how the Tribunal could resolve conflicting issues without engaging in a balancing exercise. To the extent that submissions were made to the contrary they are rejected.

A principle which appears on occasions to have been overlooked in submissions made to the Tribunal in some of the reports of Tribunal decisions is that the matters specified in section 3 can be recognised and provided for only to the extent that they can be affected by land use controls. The Act is concerned with land use planning. See Brighouse v Dannevirke County (unreported; A 86/81; 28/9/81; Tribunal), EDS v Mangonui County (supra) and AMP Society v Waitemata Planning Authority [1982] 2 NZLR 448.

Adverting now to subsection (a) the Tribunal observed in Smith v Waimate West County (supra) that it is a very loosely phrased matter of national importance and noted that it had held on previous occasions that the object of the subsection cannot be to prevent change - "controlled change being the prime objective of the Act" at (256). In the present case the Tribunal had evidence

of the undoubted impact that the development and use of the tourist resort will have on a small and relatively isolated community. On the other hand there was evidence that the development could solve or mitigate a serious social problem in the area - viz unemployment and the out migration of the younger members of the community. It weighed the one against the other and it approved the setting up of the two Committees to provide a channel of continuous communication between the community and future developers. By reducing the scale of the development it brought the deteriments and benefits into better balance. The Tribunal was in no doubt about the benefits being more in the realm of possibility than probability. With the type of zoning in question it is difficult to comprehend how the Tribunal could have found the beneficial effects to have been established beyond an acceptable degree of possibility. That was a value judgment which the Tribunal made in the light of the way in which the development is to be controlled in terms of the scheme statement and code of ordinances of which the following passage in the scheme statement is an example:-

> "It is the objective of the Council to ensure that development takes place only in a manner complementary to the landscape. It is envisaged that portions of the property will remain actively farmed and become an attraction to visitors.
>
> Development shall proceed only upon the approval of detailed development area plans, and all uses in the zone shall be controlled as to the disposition, design and external appearance of buildings and landscaping. -

> In considering any development area plan, the council will call upon the technical advice of an advisory group known as the Karikari Advisory Subcommittee (see Clause 7.8.5 for composition and further functions of Subcommittee).
>
> The Council also proposes the formation of a standing liaison committee of 5-7 persons to be known as the Karikari Joint Committee of Management - comprising representatives of the Council, the developers, the resort operators and the Ngatikahu people, and a person appointed by the community. The Committee will be chaired by the Council representative and will meet at least quarterly. The Committee will deal with the functioning of the resort and its integration with the community."

I am not persuaded that the Tribunal failed to interpret and apply section 3(1)(a) in a way reasonably open to it.

Section 3(1)(b)

"The wise use and management of New Zealand's resources".

Counsel for EDS contended that the Tribunal has consistently in prior decisions wrongly interpreted subsection (b) by holding that the expression "wise use and management of ... resources" is aimed at affording opportunities by land use planning. Counsel submitted that whether a use is wise or unwise is not to be determined by mere opportunity but by a careful analysis and weighing of all relevant impacts of a proposed use. He submitted that the ruling, which appears to have been given during the course of the hearing, rejecting counsel's submission was wrong. That submission was to the effect that in the absence of evidence of the existence of someone with the financial resources ready and willing to undertake the proposed development the

Tribunal was unable to judge whether or not the proposal would represent wise use and management of resources. Counsel submitted that the wrong approach was expressed by the Tribunal in Smith v Waimate West County (supra), it has been applied ever since and should be considered afresh, given the imperative language of section 3(1).

> "We have concluded that the "wise use of resources" provision is aimed at ensuring in a planning sense that an opportuntiy is afforded to make use thereof. When a person wishes to take advantage of the opportunity so afforded the economics of the end product of this processing is not a matter for investigation by the Council or the Planning Tribunal." (page 259 of Smith).

Counsel argued that in this case it was not possible for the Tribunal to assess the wisdom of allowing the Karikari Peninsula to be used for a huge destination tourist resort when there was no evidence of the economic viability of the kind of development envisaged by the approved zoning. He observed that in important Tribunal decisions such as Smith v Waimate West County (supra), Chelsea Investments Ltd v Waimea County (1981) 8 NZTPA 129 and Ritchie v Raglan County (1982) 9 NZTPA 15 there was a definite proposal which could be evaluated and that dicta such as that in Smith (supra) had to be considered in that background. But in this case, counsel complained, there was no such definite proposal.

On a more fundamental basis counsel for EDS submitted that, without evidence of the economic viability of a proposed development and an economic analysis to establish the costs and benefits of the proposal, the wise use and management of the resources cannot be ascertained and the local authority or the Tribunal cannot satisfy the statutory command of section 3(1); not only must this inquiry be carried out in order to discharge a statutory duty it must be done to enable objectors to challenge the economics of a proposal and to consider whether the economic, environmental and other relevant factors taken together constitute wise use. He complained that the critical relevance of economic viability has been eschewed by the Tribunal for a long time and should not continue.

There is considerable Tribunal authority to support the "opportunity" approach. In Waipu Timber Co Ltd v Whangarei County (unreported; 30/7/79; A 51/79) the Tribunal said:-

> "Land use planning is required to promote (inter alia) the economic welfare of the people of the district. But Planning's contribution to economic welfare is made by providing opportunities for and encouragement to industrial and commercial activity. It is impossible for Planning to regulate industrial activity other than by providing land of a suitable zoning."

In Re An Application by Petralgas Chemicals NZ Ltd (1981) 8 NZTPA 106 the Tribunal ruled that an inquiry into the wisdom of using natural gas for the manufacture of methanol for export was irrelevant. It appears to

proponents of the irrelevant inquiry relied upon section 3(1)(b). The Tribunal said that the words of the subsection

> "... must be read in the context of the sections in which they appear and of the TCP Act as a whole. Section 3(1) requires that the matters which it declares to be of national importance be recognised and provided for "in the preparation, implementation and administration of regional, district and maritime planning schemes". The TCP Act creates control over the use and development of land only, and does not authorise control over the use of raw materials and resources generally, once they have been won from the land. Planning schemes must be drawn up in a way which (inter alia) will allow the general resources of the district or region to be used and managed wisely. But the powers conferred by the TCP Act cannot be used to direct how resources shall be used once they are no longer part of "real property". (at 109)

> "We concede however that the question of defining the extent of planning powers is not an easy one. From the planning point of view there are three broad aspects to a decision to manufacture a particular product. One is the decision to commit a particular raw material or materials to a specific purpose, a decision which is not subject to planning control. Another is the choice of a site for the manufacturing activity, and the third is the environmental consequences of conducting the activity on a particular site. The latter two aspects are subject to planning control. But those three aspects are not separate and independent: they are interrelated. Land is a resource. And manufacture usually requires labour, energy and water. They also are resources, and their availability may vary as between sites, just as the environmental consequences of conducting an activity on one site may be quite different from the consequences which would follow if another site were used." (at 109)

In Re An Application by NZ Synthetic Fuels Corporation Ltd (1981) 8 NZTPA 138 the Tribunal held that while it required sufficient evidence concerning the national

importance of the proposed synthetic petrol plant to enable the Tribunal to weigh it against the loss of top quality land, it would not admit evidence directed to a preference for an alternative fuel because the Tribunal was not called upon to decide whether the use of natural gas for the production of synthetic petrol was the best or wisest use of that natural resource. In Chelsea Investments Ltd v Waimea County (1981) 8 NZTPA 129 the Tribunal held that the County was entitled to make provision by way of scheme change for the undeniable need to establish large-scale processing facilities for the massive timber products of the region. So long as it was satisfied that the proposed pulp mill was an appropriate means of processing timber, the Tribunal was not called upon to decide whether it was the most appropriate means. The Tribunal said at 133:-

> "The Town and Country Planning Act regulates the use of land, not the use of resources generally. A council cannot control, by its district scheme, the use that is made of forest products. The scope of the references in s 3(1)(b) and s 4(1) of the Act to the wise use and management of resources must be read in that context, and we do not interpret them as requiring or authorising a council (or this Tribunal on appeal) to inquire into, and make statutory decisions based upon, relative merits of various uses which might be made of resources such as forest products."

Court of Appeal and High Court authorities tend to support a restrictive interpretation of the subsection. In EDS v Mangonui County (supra) it was argued that the cost of proposed works for sewage disposal was high and might place a substantial burden on a

comparatively few permanent ratepayers. Speight J upheld the Tribunal decision that the question was not within the ambit of its inquiry. He said at 8:-

> "The only way in which the Appellant has suggested that is relevant is by reference to Section 3(1)(b), that the scheme must recognise the wise use and management of New Zealand resources. The submission is that resources includes money available from ratepayers. That does not appear to me to be a matter that is relevant. In preparing a District Scheme an authority is only entitled to deal with matters which are within the ambit of the Town and Country Planning Act, which, as a study of the Second Schedule reveals, relates to land use, the conservation of natural resources and their development. It is true that Section 118 refers to economic effects of the proposal, but in my view those mean economic effects of the proposed land use. Indeed it is not a function of the Tribunal to interfere in matters relating to the financing of any given scheme either by a private individual or by a local authority. One may add, however, that there may well be economic benefits to all the land in the area from having a proper drainage system, but that is an administrative function, not a planning function, and methods of payment is an administrative and political matter outside the ambit of the Act."

I reviewed New Zealand and English decisions in AMP Society v Waitemata Planning Authority at 476 to 484 (supra). Although I was then more concerned with the word "economic" in sections 4(1) and 102A(4) I also considered section 3(1)(b). My conclusion is recorded at 484:-

> "While the English cases show that financial considerations can be relevant in terms of the English statutory provisions and while it would be impertinent for me to say that financial considerations can never have relevance under the New Zealand statute (indeed they do in what is known as the hardship cases) I conclude that the word economic in its context in ss 4(1) and 102A(4) is concerned with economic land use planning and not with the financial cost of

> establishing a use such as erecting a building. I agree with Mr Thomas that the financial cost of the proposed building in this case is a policy consideration for the Harbour board which is accountable to its electorate. That financial cost does not, in my judgment, give rise to land use planning considerations; there is simply no nexus between the cost and the impact in planning terms of the proposal. That was the opinion of Speight J in the Mangonui case. I prefer to follow his opinion and those similarly expressed in other authorities in New Zealand rather than to water down a sensible clear rule by reference to judgments in the English Courts based on different statutory concepts."

In a different context Cooke J observed in Foodtown Supermarkets Ltd v Auckland City (1984) 10 NZTPA 263 that if the vague expression "New Zealand's resources" were given its widest possible scope, it could largely subvert the more detailed provisions of the Act. He did not consider section 3(1)(b) could reasonably be taken as having any significant bearing on the particular location of supermarkets in Auckland City. I expressed a similar view in relation to the location of a small neighbourhood tavern in Papakura City Council v Salutation Hotels Ltd (1982) 8 NZTPA 417, 423-424.

The authorities are now so entrenched that it would be wrong to hold that the Act is not confined to land use planning, that it is concerned with planning in a wider sense including economic planning. The word "resources" has to be interpreted in the context of a land use planning statute. The Shorter Oxford Dictionary defines "resource" amongst common meanings of the word "A means of supplying some want or deficiency; a stock or reserve upon which one can draw when necessary. ... The

collective means possessed by any country for its own support or defence". In EDS v Circular Quay Holdings Ltd (1984) 10 NZTPA 257, 260 Casey J said, after referring to similar definitions in the Concise Oxford Dictionary:

> "In a context of land use planning, it seems to me that resource is meant to describe an actual or potential benefit to the people of New Zealand associated with or arising out of land or other physical features of the environment affected by the planning process. I see no reason to limit the word by reference only to what the land physically contains or supports; in many situations it has to be used before any benefit can arise."

I adopt that description of the word. I think that the words "New Zealand's resources" mean the Country's stock pile of actual and potential benefits associated with or arising out of land or other physical features of the environment affected by the planning process. Section 3(1)(b) is aimed at ensuring that when a scheme is prepared, implemented and administered notice is taken of and provision made for wise use and management of those resources. The subsection is concerned with the use and abuse of those resources as such and not with the financial ability of the user of the financial viability of the use. Such matters are controlled by the market place and not by the Act. I agree with the submission of counsel for the Minister that land use planning is aimed at facilitating development or directing development to take place in certain areas. Although the Act contains provisions to ensure compliance with its enactments and those of schemes it is essentially an enabling Act as was

recognised by the Tribunal in Smith v Waimate West County (supra), in particular in paragraph 7 of the approved submissions of Mr McKay with specific reference to section 3 (1)(b):-

> "That is to enable and permit resources to be wisely used, not to determine that they shall be so used."

Given that to be the case, there should rarely, if ever, be instances where the Tribunal need inquire whether or not there is a person with the financial resources ready and willing to undertake a development permitted in a particular zone. I think that the Council in the first instance and the Tribunal on appeal are entitled to assume that if a person decides to develop land in compliance with its zoning he will do so with the objective of financial success. The Act does not compel him to develop the property at all; he can make use of the land in accordance with its zoning or as otherwise permitted by the Act but he may elect not to use it for any purpose. In a very real sense zoning provides opportunities. In my view the Tribunal's adherence to that proposition is entirely correct. Suitable zoning does not necessarily give carte blanche to a developer. In this case I agree with counsel for the Minister that the scheme statement and code of ordinances contain provisions to prevent abuse of the resources by any developer. I also agree that Gilmore v NWSCA (1982) 8 NZTPA 298 is distinguishable because the grant of water rights to dam the Clutha River in a particular way was seen [illegible] to be solely

dependent upon the Aramoana smelter project being completed and needing its peculiar supply of electric power. In the present case the rezoning, while admittedly tailored to the Company's tourist resort proposal, in no way commits the Company or any one else to embark on development. It is one thing to obtain a licence to erect a dam with consequential inundation of a large tract of productive farm land and with no end result. It is quite another thing to zone land in such a way that if a person wishes to develop it he is required to conform to a development scheme. Gilmore is also distinguishable for the reasons given in AMP Society v Waitemata Planning Authority (supra). I agree with counsel for the Minister that, taken to its logical conclusion, the proposition that the zoning in this case should not have been allowed in the absence of evidence that any one was ready able and willing to undertake the development would lead to the proposition that in all cases and types of zoning there would have to be an inquiry of that sort. One of the complaints about the Tribunal decision is that it declined to consider the fact that no evidence was adduced by the Council as to the availability of anyone with the financial and other resources necessary to undertake the development. The Tribunal was well aware of it, considered it and ruled against the submission that the absence of evidence was fatal to the rezoning in terms of section 3(1)(b).

The risk element highlighted in the decision was the subject of a separate submission by counsel for Tai Tokerau and it will be convenient to consider it later in this judgment. Subject to consideration of that topic I am not persuaded that the Tribunal failed to interpret and apply section 3(1)(b) in a way reasonably open to it. I conclude this part of this judgment with a reference to the evidence of Mr Putt. He summarised his opinion upon the application of the subsection in this way:-

> "In dealing with s 3(1)(b) I regard tourism as one of the more benign consumers of the nation's natural resources. In New Zealand the industry relies to a large extent on the natural beauty of the countryside. In using these natural assets the industry must itself be conscious of and refrain from their over-use or possible destruction. Hence in a sustainable and rational tourism development model the natural assets can be used again and again by visitors who look, photograph, experience, swim, ski and so on. My point in regard to the Karikari beach environment is that, as a coastal resource available to tourism, it can be used forever as long as the intensity and method of use is controlled in a manner such as, that provided for in Variation 4."

That is an opinion in regard to land use planning. It supports the proposition that the rezoning will result in a wise use and management of resources. The Tribunal was entitled to take that opinion into account in determining the issue of wise use and management.

Section 3(1)(c)

"The preservation of the natural character of the coastal environment .... and the protection of [it] from unnecessary subdivision and development."

The issues raised on this appeal related to the second part of the subsection, viz the protection of the natural character of the coastal environment from unnecessary sub division and development. Counsel for EDS and Tai Tokerau seemed to think that the three essential issues settled early in the decision of the Tribunal were put to the Tribunal by counsel for EDS in relation to section 3(1)(c) only whereas the Tribunal gave them overiding importance. Nothing turns on this point. However, the re statement of the issues by the Tribunal forms one of the questions of law raised by EDS.

Counsel for EDS contended that section 3(1)(c) required proof of a present need, not a need which may be generated in the future; the Tribunal did not have evidence before it which would enable it to satisfy itself of the positive need for the rezoning. Therefore it erred in law. He submitted that the Tribunal fell into error when it reformulated the first essential issue and changed it from "Is there a clearly demonstrated need for a tourist resort development in the district?" to "Is there justification for making zoning provision for a new tourist resort?" He submitted that the Tribunal in asking whether there was justification for making the zoning provision and if so whether the company's land was a suitable location, misinterpreted Section 3(1)(c) and erred in law in its subsequent application. The subsection, counsel argued, is concerned to avoid "unnecessary subdivision and development"; in to

prove a "necessary" development there must be proof of need; the word "unnecessary" places an onus on the party initiating a proposal which will affect the coastal environment to establish that a proposed development is positively necessary. I was referred to several Tribunal authorities which, it was claimed, support counsel's submissions. They included Wood v Waiapu County (1981) 8 NZTPA 15, Minister of Works v Clifton County (1976) 6 NZTPA 170, Ritchie v Raglan County (1982) 9 NZTPA 15, Minister of Works v Marlborough Sounds Maritime Planning Authority (1986) 11 NZTPA 343; Physical Environmental Association of the Coromandel (Inc) v Thames-Coromandel District Council (1982) 8 NZTPA 404 and Northern Pulp Ltd v Mangonui County (1986) 11 NZTPA 369. It was submitted that the Tribunal gave expression to several errors of law -viz, the new concept of a tourist destination resort is a concept which has to be marketed in order to generate market-demand and will require forceful promotion and marketing, existing demand and growth patterns in the tourism industry are not particularly relevant, the promotion of the new resort will involve a considerable risk and land use planning should give the opportunity for someone to take that risk if the developers' market research indicates that it is justified. It was contended that statements such as those were the antithesis of a positive finding of a need for a proposal involving a rezoning to permit development in the coastal environment.

The reformulation by the Tribunal of the first essential question was not in my view made in error. It is the correct question; it inquires if the making of zoning provision for a new tourist resort is correct in fact and in law. The issue is stated broadly. Within its scope must come all relevant issues under applicable sections of the Act including sections 3 and 4. The justification required will be measured by the applicable requirements of the relevant sections. If one of the requirements under section 3(1)(c) is clear proof of a need for the development of a destination tourist resort then so be it.

Counsel for Tai Tokerau supported the submissions of counsel for EDS. She contended that in the absence of evidence establishing the necessity for the proposed zoning the Tribunal was obliged to reject it. She referred to her analysis of the evidence of several witnesses previously set out in this judgment and invited this Court to conclude that there was no evidence justifying the rezoning in terms of need. She argued that the approach to a zoning for a specific development which is also site specific must be different from the approach to the usual type of general zoning; in the latter case the precise form of development is of no particular concern in land use planning but in the former, where the zone seeks to facilitate a particular development, there ought to be sufficient evidence of the detail of a specific development to enable the Tribunal properly to ascertain the

application. Given that zoning provides opportunities, here the opportunity sought is to develop a specific destination tourist resort and the Tribunal did not have sufficient detail to enable section 3 matters to be properly assessed. In particular she argued that her analysis of the evidence showed that the beach is not essential to the development which will depend largely on its own micro-climate and can be sited away from a coastal environment, there was insufficient evidence that the proposed development was achievable, not in the sense that the Tribunal should have concern for the financial success of the developer but in the sense that before creating an opportunity for development of the coastal environment the Tribunal should have evidence of the soundness of that development and the likelihood of it proceeding. She submitted that the necessity for the development is closely aligned to its achievability, but the evidence in terms of achievability was totally speculative. Moreover, the countervailing economic benefits for the local community in terms of section 3(1)(a) or (b) seemed to proceed upon assumption rather than evidence. In any event, it was based on the opportunity provided by the rezoning for a destination tourist resort but the existence of that opportunity was not established by the evidence and so the section 3(1)(a) or (b) economic benefits could not be said to be a countervailing factor of commensurate statutory weight.

While it is true that the majority of the Tribunal authorities cited by counsel for EDS place emphasis upon a proved need to subdivide or develop a coastal environment they do not establish that need has a degree of absolute primacy. Rather they illustrate circumstances in which the Tribunal has weighed a need to allow subdivision or development against the preservation of the natural character of the coastal environment and against other section 3 matters. It is probably stating the obvious to observe that there will be, as there have been, circumstances in which the natural character of the environment is so important that the Tribunal may require compelling evidence of need before commencing the balancing exercise. When this has happened I do not accept that the Tribunal has been stating propositions of law. Rather it has given the emphasis demanded by the circumstances of the particular case to proof of a need in order to remove the disqualification of protection from unnecessary subdivision and development. A good example of this balancing exercise in operation is Northern Pulp Ltd v Mangonui County (supra). The case involved the status of forestry in a proposed special coastal zone, Rural C, consisting of all land within 800 metres of mean high-water mark. The Tribunal held that it was necessary to balance the adverse effects of the proposed use against the necessity of the development in terms of section 3(1)(c). It said at 371:-

> "It was not asserted that exotic forestry adversely affects the natural character of the

> coastal environment along the whole length of the Rural C zone. Substantial lengths of the district's coastline are in the form of a sand dune system which extends a distance inland. Except for plantings on the foredunes (and it appears that it is not the practice to plant exotic trees on the foredunes), exotic forestry on those dune systems does not adversely affect the most important part of the coastal environment, viz the beach. Other substantial parts of the coastline are in the form of low hills. Exotic forestry on that land form would be of greater landscape significance. In both those situations, the question is one of balancing the adverse effect of exotic forestry on the natural character of the coastal environment against the "necessity" for the "development", i.e. the benefits flowing from the use of that land for exotic forestry. Generally speaking the benefits outweigh the visual disadvantages.
>
> But there are certain parts of the coastline which are so important in visual terms that exotic forestry should not be permitted on them; where the preservation of the natural character is the overriding factor. The question raised by those appeals is where, or how, to draw the line between where exotic forestry should be permitted and where it should not."

It follows, correctly in my opinion, that it is not the purpose of the subsection to prohibit all development within a coastal environment, as was recognised by Speight J in EDS v Mangonui County (supra) when he said that the section does not call for the impossible - "the preservation of New Zealand in pristine virginity".

It will be apparent from what has previously been written in this judgment and more particularly from reading the whole of the Tribunal's decision that in the present case the Tribunal was acutely aware of the natural character of the coastal environment, of the need to preserve it and of the effects of increased tourism upon

it. It had identified three distinct parts of the Company's land, viz the beach and foredune area, an extensive swamp and wetland area behind the foredunes including river flats and higher scrub-covered land rising behind. It insisted upon the need to protect the first two areas but approved the re-zoning in terms requiring the proposed development to take place in the third area in regard to which the Tribunal said at 16:-

> "(i) It is sufficiently far from Karikari Beach that development of tourist and holiday accommodation can be carried out in a manner which is subservient to the landscape and which substantially preserves the natural character of the coastal environment. That part of the company's land does not have an untouched or remote character.
>
> (ii) It allows participatory activities such as golf and horse-riding to be sited adjacent to the accommodation.
>
> (iii) To a degree it relates the development to the existing settlement of Whatuwhiwhi/Tokerau Beach, and it allows the resort to be related to all the beaches at the northern end of the peninsula rather than just to Karikari Beach."

The Tribunal emphasised the need to manage the beach and dune area in a way which will protect environmental and wildlife values. Due protection of those values in the beach and dunes was the reason why the Tribunal directed that there be no commitment to development beyond Stage I.

Earlier in this judgment I stated that the Tribunal could reasonably have concluded that there is a place for a destination tourist resort in New Zealand and

that it should be in Northland. Given the validity of those conclusions, given its finding, that the site is otherwise suitable and the further finding, to an acceptable degree of possibility, of economic benefits to the local community was the Tribunal obliged to conclude that this particular re-zoning authorised a development which was not necessary in relation to the duty to recognise and provide for the protection of the natural character of the coastal environment? Clearly the Tribunal decided that it was not obliged to reach that conclusion. It had recognised the matters set out in subsection (c), it provided for protection by limiting the development to Stage I and by the provisions of the code of ordinances and scheme statement. In this regard it is significant to record the following passage from Mr Putt's evidence:

> "The scale of this area must be perceived to put my statement into perspective. The stage one tourist facilities are between one and one-and-a-half kilometres from the beach. This separation is very important when one comes to assess whether the natural character of the Karikari coastal environment is being adversely affected with unnecessary development. (S3(1)(c) of the Act refers). My opinion is that the spatial arrangement proposed by the development plan does not change the natural character of the beach to any significant degree. The only direct point of disruption is where the public access is proposed and that, I consider, to be well balanced by the opportunity access provides for the public's enhanced enjoyment of the coastal environment." (page 258)

Contrary to the submissions of counsel for EDS, section (3) and in particular section 3(1)(c) do not refer to a present need nor do they refer to a positive need for

development, nor to a clearly demonstrated need for development. Moreover, land use planning is more concerned with the future than the present. When the Tribunal said that the new concept had to be marketed in order to generate market demand, that it will require forceful promotion and marketing and that existing demand and growth patterns in the tourism industry are not particularly relevant its findings reflected the evidence. It is difficult to comprehend what the question of law is. The Tribunal was faced with a new concept. It is not surprising that, as a new concept, it will have to generate its own market and, that being so, hardly surprising that little, if any, relevance attaches to the demands and growth patterns of the present tourism industry which has not yet had New Zealand experience with the destination tourist resort proposed in this case. The weight which the Tribunal gave to the extensive evidence before it of the place for this new concept in New Zealand was a matter for it. 'In the case of a new concept, such as the present, if the test in terms of section 3(1)(c) is "need" that must surely be measured in the case of a new concept in the light of all relevant circumstances relating to a new concept. The argument that the Tribunal's findings were the antithesis of the establishment of a need depends for its force upon the application of factors relevant to old concepts. Apart from the risk issue reserved for later consideration I do not agree with counsel's submissions and those of counsel for Tai Tokerau on the same points.'

The submissions of counsel for Tai Tokerau concerning the lack of evidence of specific detail and achievability are sufficiently dealt with in this judgment under section 3(1)(b) matters. There is much to the point about this being a site specific re-zoning for a specific development, but the point was taken by the Tribunal in its decision in Burkhardt v Mangonui County (supra) in which guidelines were established for the investigation and studies required as a pre condition to the Council proceeding with the present re-zoning. The investigation and studies were carried out and, so far as I am aware, placed before the Tribunal which had, in addition, a great deal of evidence directed to those issues. This has been a site and zone specific exercise in all the steps taken following the Burkhardt decision given in October 1979. In the case of a new concept, such as this, the extent and quality of the evidence required must be a matter for the Tribunal. Again it is difficult to comprehend what the question of law is. In my judgment, except in obvious cases of defective evidence, it is for the Tribunal to decide upon the extent and the quality of the evidence required so that it can determine the issues raised by section 3(1)(c). The achievability and likelihood of a new concept in fact proceeding obviously depend on circumstances relevant to the concept. The quality of the evidence is a matter for the Tribunal. From the evidence which I have read, limited to that given by the witnesses previously named, it cannot be said that the evidence in terms of achievability was totally speculative; nor do I

accept that the existence of the opportunity was not established by the evidence; nor do I accept that the economic benefit was based on assumption. It was based upon evidence of a degree of possibility which satisfied the Tribunal. In regard to the evidence that the beach is not essential to the development, while statements to that effect were made in evidence, the Tribunal was entitled to consider those statements within the context of the whole of the evidence and, on the 305 pages of evidence, which I have read, the Tribunal was entitled to conclude that, taken as a whole, the evidence pointed to the need for this type of resort to have a coastal environment. For the foregoing reasons I do not agree with the submissions of counsel for Tai Tokerau.

Subject to consideration of the risk issue I am not persuaded that the Tribunal failed to interpret and apply section 3(1)(c) in a way reasonably open to it.

Section 3(1)(g)

"The relationship of the Maori people and their culture and traditions with their ancestral land."

The Tribunal made specific reference to the Maori in the following passages from its decision:

Page 3 When discussing the population of the Peninsula:-

"There is a small Maori community and marae on the eastern side of Whatuwhiwhi; and a very small Maori community at Merita in the northern part of the Ngatikahu Block."

Page 12 When discussing evidence adduced by the appellants:-

"The appeals were supported by the Tai Tokerau District Maori Council. The particular concerns of the Maori Council were the effect which development in accordance with the variations would have on the relationship of the Ngati Kahu people with their ancestral land, the effect which it would have on the coastline and the sea, the protection of sacred sites and archaeological values and the social impact. But counsel for the Maori Council addressed on the whole case in the light of the evidence by the other parties to the appeals.

The eminent spokesman for Ngati Kahu, who gave evidence, said that his people wish to see progress but that they are against a large scale tourist resort at Karikari Bay; that they wish to preserve their lifestyle from such an obtrusive development, which he foresees as a flood which

will carry his people to the sea. He told us of the history of the area, of the significance to his people of the sea and its bounty, of the struggle for existence there and the efforts being made to ensure economic, social and cultural survival. He concluded by saying that his people would like to be associated with a smaller, locality-related development which would fit into their community and with which they could grow into a warm, welcoming and distinctively different tourist centre from the type that would be permitted by the Variations.

Another witness for the Maori Council was an archaeologist who told us of the archaeological discoveries already made in various parts of the company's land and the effect which development would have on these, and of the archaeological evidence in other parts of the peninsula."

Page 14 The Tribunal accepted the following passage from the evidence of Mr Hanley:-

"The economy must diversify and look to labour intensive opportunities. Tourism does not guarantee local jobs nor the protection of the natural environment or the economic and cultural well-being of the area's substantial Maori population. However, if well planned and with

broad based local participation and control, tourism may substantially reduce local unemployment and under-development. Few alternative opportunities are apparent at this time."

Page 17 When giving reasons for its finding that rezoning should be confined to Stage I the Tribunal accepted the evidence of the social planning witness that to achieve an appropriate and sustainable development tourism on the Karikari Peninsula must:-

"(7) ensure the protection and enhancement of the environment, local community life and the role of the Ngati Kahu as protectors of the waahi tapu and Kaimoana."

Page 18 In giving those reasons the Tribunal said that one of the principal objects of EDS was the preservation of the natural, wild and remote character of Karikari Beach, and its protection as a wild life habitat and in relation to overuse of the beach said:-

"...overuse will damage the environmental qualities of the beach and dune area and seriously affect its value as a wildlife habitat. Also the beach and dune area has

particular significance to the Maori people and contains a number of archaeological sites. There is need to manage the beach and dune area in a way which will protect environmental and wildlife values, and to that end to limit the use made of the beach. There is no way in which the number of people using the beach can be directly controlled; but that number can to a degree be indirectly controlled by limiting development in the vicinity of the beach. We have concluded that the due protection of environmental and wildlife values in the beach and dune areas requires that there be no commitment to development of a destination resort beyond Stage 1."

Pages 20 & 21 The Tribunal referred to the two local committees and suggested increased representation for the Ngati Kahu people.

Counsel for Tai Tokerau addressed submissions to me on the meaning of the expression "ancestral land". She referred to some of the relevant Tribunal decisions given before the delivery of the judgment of Holland J in Royal Forest and Bird Protection Society (Inc) v W A Habgood Ltd (1987) 12 NZTPA 76. In that case, in which the decision was given over a year after the Tribunal decision in the present case, Holland J held that decisions of the Tribunal which placed a restricted interpretation upon the

expression "ancestral land" were wrong and should be regarded as overruled. He held that the words in their ordinary meaning refer to land which has been owned by ancestors, but that ordinary meaning has to be considered in its context:-

> "In my opinion the ordinary meaning of ancestral land in the circumstances is land which has been owned by ancestors. With respect to the Tribunal I consider that it has erred in endeavouring to apply an appropriate interpretation to a part of the whole with a view to assisting it in interpreting the whole rather than first considering what is meant by the whole.
>
> What is said to be of national importance under s 3 is the relationship of the Maori people with their ancestral land, the culture of the Maori people with their ancestral land and the traditions of Maori people with their ancestral land. Under this subparagraph it is no more a matter of considering the Maori culture and traditions in isolation than it is a matter of considering the land in isolation. There must be some factor or nexus between their culture and traditions and the land in question which affects the relationship of the Maori people to the land.
>
> Clearly continuous ownership of the land by Maoris would, often be a relevant factor in that relationship. Likewise it may be an important factor to consider the extent to which a special relationship by Maoris has been claimed or recognised by them throughout the generations. More importantly, the effect of the proposed use of land on that relationship will have to be considered in each case. These instances are clearly not intended to be exhaustive. I can see no logical or legal reason why s 3(1)(g) of the Act should be of no application solely because the land in question is no longer owned by Maoris. Previous decisions of the Tribunal to this effect should be regarded as overruled."

In that case there was no adequate evidence before the Tribunal as to what the Maori would regard as ancestral land. However, the Tribunal ruled that section 3(1)(g) was of no application because, following its previous

decisions, the land was owned by the Crown and not by Maori people. There was thus an error of law which, in the normal course of events, would have resulted in the decision of the Tribunal being quashed or referred back to it. However, from his consideration of the evidence before the Tribunal, Holland J was satisfied that the consideration in fact given by the Tribunal to the relationship of the Maori people and their culture and traditions with the piece of land in question, albeit perhaps in terms of other enactments such as section 3(1)(a), would have resulted in the same decision if the Tribunal had considered the same evidence in terms of section 3(1)(g). The Tribunal decision was upheld and the appeal to the High Court dismissed.

Counsel for Tai Tokerau told me that she had specifically invited the Tribunal to find that the land was ancestral land. I understand that her submissions to the Tribunal were similar to those made to Holland J by counsel for the appellant in Habgood. In the present case the Tribunal made no determination on the point although, from the passages recited from its decision, it did take Maori concerns into account. It is not clear from those passages or from the decision read as whole whether the Tribunal applied the provisions of section 3(1)(g) or section 3(1)(a) when it dealt with the evidence of matters of Maori concern. It was contended because section 3 matters are of national importance and were of express concern to Tai Tokerau the failure of the Tribunal to give

a clear determination in regard to "ancestral land" and to section 3(1)(g) generally was tantamount to a failure to give adequate consideration to the application and effect of the subsection and therefore an error of law. Counsel submitted that in this respect the case is similar to Raceway Motors Ltd v Canterbury Regional Planning Authority [1976] 2 NZLR 605 where Casey J took the view that the Town and Country Planning Appeal Board had virtually summarily dismissed the appellant's case based on hardship in relation to a specified departure application. At 612 Casey J observed that the case stated (it being the then appeal procedure) confirmed there was evidence demonstrating significant hardship and injustice which should have been considered by the Board as relevant factors. He accepted in the case of a special tribunal adjudicating in its field of expertise a Court reviewing its decision should approach its task with a desire to uphold the tribunal's determination if it can reasonably be supported but he was satisfied that such reasons as were given for the decision were so brief as to be quite inadequate to satisfy him that the relevant factors and submissions on hardship and injustice had been taken into account. In the interests of justice he considered the case should be re-heard. Counsel's alternative contention in the present case was that the failure to deal adequately with section 3(1)(g) was in the circumstances a failure to give reasons. It was insufficient to have reached a conclusion upon rezoning contrary to opposition by Tai Tokerau because conclusions are not reasons.

Counsel for the Council told me that no evidence had been adduced before the Tribunal that the land in question had been owned by ancestors. Whether or not that be so the part of the record of the Tribunal continuing the principal evidence directed to section 3(1)(g) considerations is not before me. The witnesses Jones and Putt gave some evidence on the issue and I observe that when the matter of the record was considered by Tompkins J in October 1986 the primary concern of counsel for Tai Tokerau seemed to be the record relating to the finding that there is a place for a destination resort in new Zealand tourism and that it should be in Northland. See judgment 10 October 1986 at 3, 4 and 8. I do not have the advantage afforded to Holland J in Habgood nor the advantage of a case stating the relevant facts as was the position in Raceway Motors Ltd. The evidence of Mr Jones at pages 50 to 52 and 54 and of Mr Putt at pages 259-261 shows that the Tribunal was alerted to Maori concerns in terms of section 3(1)(g) and, for example, the existence of middens in the sand dunes is referred to in the scheme statement at page 11 in the context of the conservation covenant to be entered into under section 77 of the Reserves Act 1977.

Preferably the Tribunal should have made specific reference to section 3(1)(g) and to whether or not the land in question or any land affected was ancestral land. For land affected see Williams v Minister of Works (1983) 9 NZTPA 140. But the Tribunal did not ignore Maori

concerns. Moreover, its decision of 21 pages gives a careful appraisal of the background to the Variation applications, appears to give a careful summary of the evidence for and against the Variations and traverses in a considered and balanced way the issues in terms of the Act. As a decision it cannot be compared with the criticised decision in Raceway Motors Ltd. In the absence of the full record relating to Maori concerns I am not persuaded that the Tribunal failed to give adequate consideration to the application and effect of section 3(1)(g) nor, when it is remembered that the Tribunal is an expert tribunal acting within its area of expertise, do I consider that it fell into any error in the manner of supplying reasons for its determination. On the contrary, among its reasons for confirming rezoning to Stage I of the proposed development were Maori concerns. Significantly Mr Putt said in evidence:-

> "The Ngatikahu people are the tangatawhenua of the Karikari peninsula and have considerable landholdings there. The whole area contains historic and archaeological sites which have been recorded by Ms C A Phillips in her survey which forms part of the referenced material in section 7.8.2 of Variation 4. The safeguarding of these sites is provided for through the consultative process established and through the vetting process provided in the move from stage one to stage two (see Schedule A, page 13 of Variation 4).
>
> The protection of cultural values and traditions cannot be guaranteed since they rely as much on the custodians of those values as on the development. From my experience, in the process of change, traditional values can be retained and even enhanced as long as the change is not catastrophic and as long as the current inhabitants are involved in the process in an open and fully informed manner. Variation 4

> allows this to occur through the joint Committee of Management." (page 259)
>
> "With regard to section 3(1)(g) I refer to my previous para 7.7. As long as the joint committee is involved and acknowledged in the County decision-making structure then the local people will retain an effective influence. This process will require goodwill from all sides in order to succeed." (page 261)

That evidence is mirrored in the Tribunal's decision.

I am not persuaded that the Tribunal failed to apply section 3(1)(g) in a way reasonably open to it.

Section 4

No specific submissions were addressed by either of appellants' counsel to the provisions of section 4. Some of the phraseology of section 4(1) is similar to that in section 3(1) such as "wise use and management of the resources" and "the health, safety, convenience, and the economic, cultural, social, and general welfare of the people." The purpose of the subsection appears to be to emphasise similar concepts in relation to the planning of districts in contrast to the national concept expressed in section 3. Insofar as the submissions of counsel in relation to section 3 matters may be thought to carry over into section 4 matters they have, I think, already been sufficiently considered by me.

I am not persuaded that the Tribunal failed to interpret and apply section 4(1) and (2) in a way reasonably open to it.

The Function of the Tribunal

Counsel for Tai Tokerau contended that the Tribunal had misconstrued its function and responsibilities first in making an assumption that it was not possible to attach a destination resort to an existing tourist community and secondly in its expressed attitude to the risk which the promotion of a new tourist resort involves.

In regard to the first contention counsel submitted that the Tribunal misconstrued its functions, that the issue whether a resort could be attached to an existing tourist community in Northland was directly relevant to the issue of whether the rezoning was unnecessary in the Karikari coastal environment. Counsel argued this was not a matter on which the Tribunal was entitled to make any presumption but a matter on which it had to be satisfied to pursuant to section 3; the weighting introduced by the statutory scheme will not be carried out if presumptions of this sort are made. It was submitted if the Tribunal was not satisfied it was not possible to attach a destination resort to an existing tourist community in Northland, then it could not have

been satisfied that the development was necessary and should have rejected the Variations.

At first impression counsel's submissions appear to be sound. However, it is important to understand that the Tribunal was confronted with a new concept. The Tribunal said that the witnesses supporting the Variations "asserted" that a destination tourist resort should be in a new location and one which can provide its own natural and man made attractions. The Tribunal then said that those witnesses had "suggested" that, for servicing and other reasons, it is not possible to attach a destination tourist resort to an existing tourist community in Northland. The evidence appears to me to be more than a suggestion. For example, Mr Putt said:-

> "In examining the urban zones of the County and the upper half of the Northland region I conclude that there are no existing areas into which a development of the scale proposed might fall. Inherent in the concept of a comprehensive tourist destination resort is the proviso that a currently uncommitted/undeveloped area be located and available. Karikari provides such a site. I would note that there is no guidance on these matters contained in the proposed Regional Scheme." (page 253)

> "There would be little sense in attempting this kind of a project on a piece of land that was heavily subdivided and with a multitude of owners; it would be a nightmare from the local authority's point of view who are in themselves attempting to be part of the promotional .." (page 268)

The total impact of the 305 pages of evidence which I have read is that the concept of this resort is one which has

its own vitality and does not sit easily with satellite tourist attachments. The Tribunal said that the witnesses "assured" it about the impossibility of attaching a destination tourist resort to an existing tourist community in Northland. An assurance is a positive statement about, in this case, the correctness of an opinion. It was not necessary for the Tribunal to state it "had to presume". I think that was an unfortunate choice of expression and really what the Tribunal intended to say was that it had to draw that inference based on opinion evidence given in the form of an assurance.

I am not persuaded that the Tribunal determined this question in the absence of evidence nor that it fell into error in weighing up all the factors which required to be weighed in terms of sections 3 and 4 of the Act.

In respect of the second contention it was submitted that risk assessment is properly the function of the Tribunal in carrying out its functions in terms of section 3, it is not a burden falling solely upon the developer or his competitors in the tourist industry, it is a burden, in terms of land use planning, which falls upon land to which sections 3(1)(c) and 3(1)(g) apply if that land is unnecessarily compromised, a burden which has to be assessed in terms of wise use and management under section 3(1)(b) and borne by the physical environment under section 3(1)(a). Counsel argued that the Tribunal lacked the evidence which it ought to have had to permit

it to assess the risk in its decision making process; in this case it did not have the evidence to weigh the relevant factors according to the degree of risk attaching to rezoning and the extent of the harm or benefits resulting. Therefore, the Tribunal did not in fact weigh up the relevant factors and in consequence committed an error of law.

The risk referred to by the Tribunal was the commercial risk to any developer of the resort. Earlier in this judgment I referred to the passive effect of zoning. The rezoning in this case placed no obligation on the company or any successor in title or any other person to develop the land. As a matter of commonsense and commercial prudence a developer is unlikely to embark upon this development without a full investigation and assessment of the commercial risk. It is noted from the scheme statement that the commencing development has to include a destination resort hotel. That obligation will tend to ensure that the initial development is not undertaken by someone without the requisite financial resources. It was right for the Tribunal to make the observation it did about the considerable commercial risk. Land use planning is not concerned with commercial risks; it is concerned with the risks involved in zoning, in this case rezoning, for land use. Land use risks cannot, in my view, be equated with commercial risks. The land use risk element in sections 3 and 4 were thoroughly investigated and assessed by the Tribunal. The advantages

Answer

(a) Whether the Tribunal erred in law in its interpretation and subsequent application of sections 3 and 4 in holding that "applying the requirements of Sections 3 and 4 there is justification for making zoning provision for a new tourist resort ..." (page 13) No.

(b) Whether the Tribunal erred in law in its interpretation and subsequent application of Sections 3 and 4 in holding that "a new destination resort, may significantly reduce local unemployment and under-development. The possibility that it will have those beneficial consequences on the district has weighed heavily with us in coming to the conclusion that land use planning should give the opportunity for someone to develop such a resort, to the extent of Stage 1. (However, we repeat that it is only a possibility that a destination resort will have beneficial, social and economic effects on the district in general, and on the local community in particular. A resort could be successful from the developer's point of view yet unsuccessful in terms of its

		Answer
	effects on the district and community)." (pages 14 & 15)	No.

EDS

(c)	Whether the Tribunal erred in law in its interpretation and subsequent application of Sections 3 and 4 in holding that "The question before us is whether it would be wise use and management of the land affected, to allow it to be put to the purposes proposed in the Variations. If it is to be put to those purposes, then other resources will be required to develop the land. Where those resources will come from, indeed whether they will be available, are not questions which land use planning can examine." (page 12)	No.
(d)	Whether the Tribunal erred in law in ruling against the submission by Counsel for EDS that in the absence of evidence establishing that there is an investor "with the financial resources ready and willing to undertake the development ... the Tribunal is unable to judge whether the proposal would represent wise use and management of resources." (page 12)	No.

Answer

destination resort involves a very considerable risk; as we said, market demand and support must be generated. If a sufficient degree of new market support is not generated, it could have an adverse effect on the existing tourist infrastructure. But we have been persuaded that land use planning should give the opportunity for someone to take that risk if their market research indicates that it is justified. And no one from the tourist industry opposed the Variations." (page 14) No.

(i) Whether the Tribunal erred in law in allowing development for which no present need can be demonstrated in the coastal environment. See below.

TAI TOKERAU

(j) Whether the Tribunal erred in failing properly to apply the provisions of Section 3(1)(g). No.

(k) Whether there was any evidence before the Tribunal reasonably capable of

Answer

supporting the finding of the Tribunal that "there is a place for such a destination resort in New Zealand tourism and that it should be in Northland". (page 14) Yes.

(l) Whether the Tribunal misconstrued its own function and responsibilities particularly pursuant to sections 3 and 4 in holding "for the purposes of this decision we have had to presume that it is not possible to attach a destination resort to an existing tourist community in Northland. (The appeal process is just not appropriate to make a wide ranging inquiry into an issue of that kind.) Those supporting the variations assured us that is so. Nothing advanced by the Appellant caused us to question that assurance." (page 14) No.

(m) Whether the Tribunal failed properly to apply the provisions of sections 3 and 4 in holding that a possibility of beneficial consequences for the District (page 14 and page 15) justified the zoning provision notwithstanding the risk in promotion of a new destination resort (page 14). No.

Answer

(n) Whether the Tribunal erred in law in its interpretation and application of sections 3 and 4 in holding that land use planning cannot examine the availability of other resources required for development of the land. No.

(o) Whether the Tribunal erred in law in allowing development for which no present need can be demonstrated in the coastal environment. See below.

(p) Whether the Tribunal erred in law in allowing development for which no present need can be demonstrated on ancestral land of Ngati Kahu. See below.

Answer to question (e):-

The Tribunal did consider the fact and did not err in its consideration.

Answer to questions (i), (o) and (p):-

These questions beg the affirmative answer. The Tribunal correctly found that there was justification for making zoning provision for a destination tourist resort, to the extent of Stage I as defined in the Variations; and that in land use planning terms the land proposed to be rezoned for Stage I is a suitable site for it.

It follows from the answers given and from my reasons for judgment that both appeals should be dismissed. Each appeal is accordingly dismissed.

All questions of costs are reserved. Counsel have leave to file memoranda. If the questions cannot be resolved by that process I will hear counsel.

A.F. Chilwell J.

17TH December 1987

Solicitors for Appellants:	Russell McVeagh McKenzie Bartleet & Co AUCKLAND
Solicitors for Mangonui County Council:	Dragicevich, Campbell & Smith KAITAIA
Solicitors for Doubtless Bay Development Co Ltd:	Kennedy Tudehope Railey & Martin AUCKLAND
Solicitor for Minister of Words & Development:	Crown Law Office WELLINGTON

Reserved decision delivered by me on 18 December 1987 at 4.30 pm

G.A MORTIMER
Deputy Registrar

ex received.

ex registry
Mr Curry - Environmental Defence Soc. S/N.

ex chambers
Ms Elias - Maori Council. N. Kaplay on 18.12.87 @ 4pm → 4.15pm

Mr Salmon - Manganui Council S/N

Sent at Solrs request @
R Robinson Ministry of Works S/N
Sc

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M. No 573/86

IN THE MATTER of the Town & Country Planning Act 1977

A N D

IN THE MATTER of an appeal pursuant to Section 162 of the Act from a determination of the Planning Tribunal

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

A N D MANGONUI COUNTY COUNCIL

First Respondent

A N D

M. No. 574/86

BETWEEN TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

JUDGMENT OF CHILWELL J
