SUSTAINABLE MANAGEMENT OF OUR COAST – LEARNING FROM THE PAST AND LOOKING TO THE FUTURE

This paper was presented at the New Zealand Planning Institute Conference, Hamilton, May 2003. The author **Richard Brabant** is a barrister specialising in environmental law with over 25 years experience in town and country planning and resource management. Richard's practice has involved many cases relating to development and use in the coastal environment including some notable coastal

PART II OF THE RESOURCE MANAGEMENT ACT 1991

In October last year Justice Peter Salmon delivered the inaugural Salmon lecture to the Resource Management Law Association, a lecture entitled "*Sustainable Development in New Zealand*". The lecture focused on the experiences of the Judge at the Global Judge's Symposium held in Johannesburg in August 2002. The bulk of the lecture addressed the global importance of sustainable development and covers the breadth of globally important issues involved as well as relating the importance of a sustainable approach here in New Zealand. The opening section of the lecture refers to the definition of sustainable development from the *Brundtland Report* published by OUP in 1987 and then goes on to discuss "*sustainable development*".

While the Judge wished to present the challenge of sustainable development as a matter of global concern, and therefore a matter of concern in this country, this paper concentrates instead on "*sustainable management*". This is a somewhat broader concept than "*sustainable development*".

The Act has a special definition for "*sustainable management*".

As defined, *sustainable management* means managing:

- use
- development, and
- protection

of natural and physical resources.

Reverting to The Shorter Oxford Dictionary in relation to each of these words I suggest the following useful definitions:

(a) **Use**

- application or conversion to some purpose
- the opportunity, right or power of using something
- the advantage of a specified person or persons in respect of profit or benefit derived from land or other property
- ability to be used especially for a particular purpose; usefulness; advantage

(b) **Development**

- the action or process of developing; evolution, growth, maturation; a gradual unfolding, a fully working-out.
- a developed form or product; a result of developing; a change in a course of actions or events or in conditions; a stage of advancement
- the state of being developed; a developed condition, a full-grown state
- the action of developing land etc. so as to realize its potentialities
- economic advancement or industrialisation of a country etc. not previously developed

(c) **Protection or protect**

- defend or guard against injury or danger
- aim to preserve (a threatened plant or animal species) by legislation
- restrict by law access to or development of (land) in order to preserve its wildlife or undisturbed state

and **Protection forest**

- a forest planted to provide a dense cover of vegetation which helps to inhibit erosion and conserve water.

In my view it is important to recognise that in New Zealand our environmental code does not focus on development, but is also concerned with the way in which natural and physical resources are used, and the protection of resources. Often completion

of development heralds the commencement of use. Protection is contemplated during development and use. All three concepts are embraced.

An emphasis on long term outcomes is found in the subsections which follow the definition:

- sustaining potential for these resources to meet the reasonably foreseeable needs of future generations, and

- safeguarding the life supporting capacity of air, water, soil and ecosystems.

In my experience it is common for practitioners in the resource management field to overlook the important distinction between development and use. For example a proposal for an apartment building. The development of the building creates a physical structure and is likely to be subject to development controls in the District Plan. Once built that physical resource will be used – usually entirely for residential purposes which may be a permitted activity by reference to the same plan rules.[1] The development phase is seen as most likely to have an adverse effect on the environment. Conversely farming and forestry are frequently permitted activities in rural (including coastal rural) zones under current district plans. In many instances the process of development (such as farm roads or buildings) may be of less environmental consequence than the ongoing use of the natural and physical resources for the permitted purpose.

Other provisions of Part II of the Act have a particular significance in respect of sustainable coastal management.

Section 6(a) seeks the preservation of the natural character of the coastal environment.

Preservation is defined relevantly as:

- the action of preserving or protecting something

  and **preserve**

- keep safe from harm, injury; take care of, protect, keep free from decay

Furthermore not only does the section seek that the natural character be preserved, but also that the natural character is protected from inappropriate subdivision, use and development.

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[1] See the discussion of this by the Court of Appeal in *Body Corporate 97010 v Auckland City Council*, [2000] NZRMA 529, at para 47

Section 7, subsections (c), (d) and (f) require in relation to managing use, development and protection of natural and physical resources that particular regard be had to maintaining *and enhancing* amenity values, to the *intrinsic values* of ecosystems, and to maintaining *and enhancing* environmental qualities.

How well has this been achieved since 1991 and could we do better in the future?

Dennis Scott's work is well known. He has received special endorsement in two Environment Court decisions approving rural subdivisions in the coastal environment based on his conceptual approach and design work.[2]

That catchment management design approach underpinned the development of the Hauraki Gulf Islands section of the Auckland District Plan. I believe this was the first district plan to become operative under the RMA and was the recipient of an award by the Planning Institute.

Despite that I see little change in fundamental attitudes to coastal land use and development in many regional and district planning documents, and generally a negative response by consent authorities and other agencies to the approach espoused by Dennis Scott (and others).

Projects which have been considered by the Environment Court based on this approach have been found to warrant consent because they so strongly reflected the purpose of the Act and were supported by those provisions in Part II I've referred to. When responding to these proposals District and Regional Councils have given insufficient weight to the potential positive effects on the environment that can result from a design approach which sets out to confine future development and use to areas where it can be done on a sustainable basis. Conversely those areas which are found to have unsustainable land use patterns or are subject to unsustainable land use activities are revegetated and protected in perpetuity with appropriate covenants or other forms of encumbrances on property titles.

There has been an unwarranted focus in assessing these matters from a "*landscape*" point of view on alleged adverse visual effects from new building development. Taking an overall holistic approach to the effects on the environment of allowing the activity (positive and adverse) and all of the relevant provisions in Part II of the Act it is hard to understand why these issues of building visibility become so dominant in the evidence against projects of this nature. I suggest other issues are more

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[2] *Di Andre Estates v Rodney District Council*, D No. W187/96, *Arrigato Investments v Rodney District Council*, [2000] NZRMA 241

important such as the benefits acknowledged by the landscape architect giving evidence opposing the *Arrigato* proposal:

> It is only fair to point out that successful revegetation would help to push the Pakiri landscape towards a desirable, more "natural" state...
>
> and
>
> This means that the proposals for revegetation should be viewed in a positive light and would enhance the character and value of Pakiri if successful.[3]

The New Zealand Coastal Policy Statement is applicable to the wider coastal environment, not just the coastal marine area. The very first chapter sets *national priorities* for preservation of the natural character of the coastal environment and protection from inappropriate subdivision use and development.

To me the policy which encourages appropriate subdivision use or development in areas where natural character has already been compromised has been too narrowly interpreted and applied. A great deal of the coastal rural land I am particularly familiar with (Whakatane northwards on the eastern seaboard) exhibits extensive areas of degraded land. The effects of erosion and unsustainable land use practices have compromised the natural character.[4] Where are the objectives, policies and rules encouraging appropriate use or development in these locations in the first generation of plans prepared under the RMA?

In the NZCPS it is a *national priority* to restore and rehabilitate the natural character of the coastal environment where appropriate (Policy 1.1.5). This policy was specifically adverted to by the Environment Court in the *Di Andre* decision. In *Di Andre* and *Arrigato* reference was made to the failure of the District Plan to respond to this issue.

That District's new Proposed Plan has included an opportunity for "*revegetation subdivision*" but based on the same flawed view of revegetation projects as trade-offs to achieve rural-residential development.[5]

Policy 3.2.10 of the NZCPS also recognises restoration planting.

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[3] *Arrigato* Environment Court decision, paragraph 29

[4] I refer to the words of the Environment Court in *Arrigato* at paragraph 43 "We consider that pastoral "development" in the context of this land and seascape is a significant degradation of a previous pristine environment causative of such problems as erosion, slippage and run-off contamination".

[5] *Arrigato* Environment Court decision, paragraph 30

In my view these policies gave a clear message to Regional and District Councils about the need for the restoration and repair of New Zealand's coastal environment. Yet many district plans continue to provide for general farming activities and even exotic forestry plantings in the coastal environments as permitted activities. In the next generation of district plans I suggest these uses should be at least subject to appropriate terms and conditions requiring sustainable management. While existing farms and forests can rely on s10 in respect of the land use component, this sits uneasily alongside the Act's requirement that the discharge of contaminants meet modern environmental standards whilst providing a grandfathering procedure to allow time for existing uses to be upgraded or relocated.

And if in the future, new standards of sustainable management apply to all activities in the coastal environment then those which are unable to meet those environmental and economic standards should be phased out and replaced with new and appropriate activities as has happened in many situations in our cities and towns. Again the NZCPS took a strong lead in 1994, making it clear that the maintenance and enhancement of water quality and the preservation of the character of the coastal environment required a paradigm shift in attitudes to disposal of human waste.

In my view the approach to development and use of the coastal environment described by Dennis Scott is strongly supported by the national imperative of preservation of the natural character of the coastal environment. The potential positive effects on the environment resulting from a change to sustainable land use practices coupled with protection of revegetated areas was recognised in the *Di Andre* and *Arrigato* Environment Court decisions as of great importance:

> It would in our opinion be an extremely backward step if this opportunity to revegetate these slopes visible from the Omaha settlement in a manner fully in accord with the provisions of Part II of the RMA was lost.[6]

And in Arrigato:

> We are of the view that Mr Scott's proposal can only enhance and improve the existing degraded landscape, a landscape which has been denuded of its hitherto native vegetation resulting in soil instability and erosion. The creation of a substantial area of revegetated coastline in this location will, in our view, have a positive outcome. We find it will deal with the adverse effects of existing erosion, subsidence and slipping and will have the further positive ecological effect of establishing a stepping-stone, thus enabling the establishment of bird corridors

[6] *Di Andre*, page 37

> between the off-shore islands of Little Barrier and the Hen and Chickens, facilitating the transfer of birdlife from these islands and the opportunity to establish endangered species on the coastal edge and subsequently inland.[7]

By contrast many district plans have continued with the practice of identifying "*the rural character*" or "*an existing rural character*" as the desirable state of affairs. As a result these planning provisions have failed to recognise the environmental benefits of a change in land use practices as part of new development proposals, and through objectives, policies and rules promoting the existing state of affairs have sought to "*lock-in*" the existing environment where much of it represents unsustainable management of natural coastal resources, and when a continuation of those practices will result not in environmental maintenance let alone enhancement, but continuing degradation.

I suggest the notion that developed pastoral landscapes can be viewed as part of the natural character of the coastal environment is to be rejected. As the Court in *Arrigato* said:

> We consider that pastoral "development" in the context of this land and seascape is a significant degradation of a previous pristine environment causative of such problems as erosion, slippage and run-off contamination.[8]

Objectives and policies that emphasise the merits of preservation of the so-called "*existing rural landscape*" seriously hinder the ability to achieve sustainable management of our coastal environment. They have the effect (in combination with permitted activity status for general farming activities) of preferring the state of affairs that exist in those landscapes to what could be achieved by a new design approach based on catchment management. Indeed these new proposals have usually been consigned to the non-complying activity basket. They are also required to challenge the long-established approach of controlling use and development of our rural coastal environment through subdivision controls using arbitrary minimum lot size rules for the dubious objectives of retaining productive land use opportunities (now frequently called maintaining the versatility of soils in order to slot in under the changed wording in the RMA), or preventing a proliferation of buildings in the rural landscape.

These outmoded concepts also imply that what exists (at the time the plan was written) is "*good*" when clearly the Act requires a sustainable management approach as described in Part II of the Act. Without active management already unsustainable

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[7] *Arrigato*, Environment Court, paragraph 33

[8] *Arrigato* Environment Court, paragraph 43

land use practices and the presence of exotic pests will serve to further degrade ecosystems and the landscape. Intervention is required by the Act and if that intervention achieves positive environmental outcomes through good design practices, then district plans ought to encourage those initiatives.

The repair and restoration of the degraded coastal lands is an expensive proposition. Using appropriate indigenous species and sound planting and maintenance techniques amazingly quick results can be achieved considering natural processes are at work. Already much has been learnt over a relatively short period of time. But all too frequently the long term benefits and the necessary time for vegetation growth has not been recognised. Instead proposals of this nature have been challenged on the grounds of alleged adverse visual effects of new buildings and arguments of potential failure of revegetation and other restorative measures.

Although the catchment management design approach can be used to advantage in conjunction with conventional farming, horticulture or viticultural opportunities, of necessity many of these projects will be completed in conjunction with development of rural residential opportunities. On many properties the areas of land which are available to be used for some productive purpose after land has been retired from unsustainable use and revegetated are too small to be used for farming. In these circumstances there is no reason for District Plans not to acknowledge rural-residential use as a productive and efficient use of that land. Moreover on-going management is a critical component of the successful rehabilitation of degraded landscapes. Well drafted consent conditions for these projects will require active and long-term management of exotic weed and animal pests. Northland coastal slopes in particular can suffer from major kikuyu grass infestation which requires very expensive revegetation work and a long period of ongoing maintenance to ensure indigenous plant survival.

Enabling development and use is for communities as well as individuals, and can provide for social and cultural well being as well as having economic and health and safety advantages. Many rural areas have become gradually de-populated over recent decades as traditional farming practices change and many farms become uneconomic farming units. The introduction of new families into rural communities is an environmental benefit frequently ignored. There are many examples already of districts where changes in land use involving rural residential developments have produced significant gains in those communities including revitalisation of schools and community facilities, local industry and creation of new job opportunities. History can tell us this is a new cycle of change in these areas comparable to the first wave of development of bush and swamps into farms.

Finally a word about transferable development rights. These have been used in some district plans prepared under the RMA. I presume they are seen as a way of achieving good environmental outcomes. The technique has been endorsed by some regional councils.

In my opinion the process is contrary to the fundamental provisions of the Act. Essentially the notion is that a commitment to preserving an area of existing valued indigenous vegetation can be traded off for the benefit of being able to subdivide in another rural location. Proposals that I have seen advanced on this basis are usually rural-residential subdivisions that produce no environmental gains for the recipient land. Rather they take advantage of an increased density of subdivision development simply because of bush protection on another unconnected area of land. Usually not even in the same catchment. The existing bush should be protected because of its intrinsic worth; yet many Councils have failed to grasp the nettle of indigenous vegetation clearance controls and the need for protection of important natural features including wetlands, rivers and streams and their riparian margins. The starting point of any Plan acknowledging sustainable development use and protection must be to ensure that all existing land uses conform to the principles of sustainable management, which implies protection of existing bush. New proposals should likewise have to meet the same test. TDRs are a "*trade-off*" approach to land use planning which has no place under the Act.