

**IN THE ENVIRONMENT COURT
I TE KOTI MATUA O AOTEAROA**

ENV-2018-WLG

WELLINGTON REGISTRY

IN THE MATTER OF

An appeal to the Environment
Court under clause 14 of the First
Schedule to the Resource
Management Act 1991

AND IN THE MATTER OF

Proposed Kapiti Coast District
Plan

BETWEEN

**ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED**

Appellant

AND

KAPITI COAST DISTRICT COUNCIL

Respondent

NOTICE OF APPEAL ON DECISIONS ON PROPOSED KAPITI COAST DISTRICT PLAN

Royal Forest and Bird Protection Society of New Zealand Inc.
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Solicitor acting: Erika Toleman
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To: The Registrar
Environment Court
PO Box 5027
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Appellant

1. The Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) appeals decisions of the Kapiti Coast District Council on the Proposed Kapiti Coast District Plan (the Council, the Plan and the decisions).

Submission

2. Forest and Bird made submissions and further submission on the Plan including Variation 1.
3. Forest and Bird received notice of the decisions on 8 December 2017.

Respondent

4. The decisions were made by the Council.

Trade competition

5. Forest and Bird is not a trade competitor for the purposes of section 309D of the Resource Management Act 1991.

Decisions being appealed

6. The decisions being appealed relate to:
 - (a) Definitions related to biodiversity in chapter 1;
 - (b) Policies and rules relating to biodiversity in Chapter 3: Natural Environment;
 - (c) Rules relating to biodiversity in Chapter 5: Living Zone and Chapter 6: Working Zone.

GENERAL GROUNDS OF APPEAL

7. In general terms the grounds of appeal are that the decisions are unreasonable, impractical and inconsistent with the purposes and principles of the Resource Management Act 1991 (RMA) including with respect to:
- (a) Section 5 – the Council decisions do not promote the sustainable management of natural and physical resources;
 - (b) Section 6 – the Council decisions do not recognise and provide for the protection of significant areas of indigenous vegetation and significant habitats of indigenous fauna;
 - (c) Section 7 – the Council decisions do not have particular regard to the intrinsic values of ecosystems, the maintenance and enhancement of the quality of the environment or the finite characteristics of natural and physical resources;
 - (d) Section 31 (1) (b) (iii) - the Council decisions do not contain sufficient provisions for the control of land use and development for the maintenance of indigenous biological diversity;
 - (e) The decisions do not give effect to the relevant provisions of the Wellington Regional Policy Statement (RPS); and
 - (f) The decisions do not represent best resource management practice.

PARTICULAR REASONS FOR APPEAL AND RELIEF SOUGHT

Chapter 1: Definitions

8. 'Indigenous vegetation' definition: Forest and Bird seeks the amendment of the definition of 'indigenous vegetation', which appears in Section 1.4 of Chapter 1, and is repeated in Chapter 3 under a heading 'Chapter Structure'. The definition reads:

Indigenous Vegetation means vegetation or plant species, including trees, that have established naturally within the Kapiti Coast District and excludes vegetation or plant species, including trees, planted or introduced to New Zealand by humans.

9. This definition ignores that indigenous vegetation, even where planted by humans, can have important biodiversity value. The definition undermines restoration projects, and is contrary to s6 RMA, which is not limited to vegetation that has naturally established. It is contrary to Council's obligation to maintain biodiversity under s31.
10. The exclusion of vegetation planted by humans is also superfluous in the definition, as the Plan already proposes relevant exemptions under the vegetation trimming and modification rules.
11. Forest and Bird seeks that the definition be amended to include indigenous vegetation planted by humans.
12. 'Modification' definition. The relationship between modification and trimming is not clear. Given the way that the Plan rules and policies treat the two activities, the definitions need to be made much more clear as to what each activity encompasses. The reference to the trimming rules further complicates the definition. Forest and Bird seeks that the definition is made more clear to ensure that Plan users know what is allowed under the Plan.
13. 'Trimming' definition. The relationship between trimming as defined here, and modification, remains unclear. It is further complicated by the operation of the rules. Forest and Bird seeks that the trimming definition is made more clear to ensure Plan users know what is allowed under the Plan.

Chapter 3: Policies

14. Note that 'Proposed Policy X' refers to the policy numbering as notified, and 'New Policy X' refers to the policy numbering in the Council decisions tracked changes version.
15. Proposed Policy 3.1– Ecosystem services. Forest and Bird opposes the deletion of this policy. The policy gave clear guidance on the RMA obligation to protect and maintain biodiversity. Forest and Bird seeks that this policy be retained.
16. Proposed Policy 3.2 - Identification of sensitive natural features. Forest and Bird opposes the deletion of this policy, given the importance of continuing

to identify areas of significant biodiversity after this Plan comes into effect. No Council can ever be completely certain that all areas of significant biodiversity have been identified in a Plan, so it is important to retain this policy in order to meet RMA obligations.

17. Forest & Bird seeks that this policy is retained, but with amendments so that it refers to the identification of significant biodiversity (rather than 'sensitive natural features') when considering consent applications on land containing indigenous vegetation.
18. Proposed Policy 3.3/New Policy 3.1 – Protection. Forest & Bird opposes parts of this policy.
19. The policy only protects scheduled areas. The policy needs to include guidance for indigenous vegetation that may not meet the significance criteria in New Policy 3.7, given the Council's RMA obligations to maintain biodiversity. Without policy guidance here or in another relevant policy, there is no policy basis for some of the rules managing vegetation modification outside scheduled areas.
20. The policy generally does not provide any real guidance to decision makers on how protection of biodiversity should be achieved. Given the deletion of several policies which provided this detail, this policy should be more directive.
21. Forest and Bird notes that s6(c) RMA requires that significant biodiversity is protected. The additional words 'from inappropriate subdivision, land use and development' should not apply to significant biodiversity.
22. Proposed Policy 3.7 – Subdivision. Forest and Bird opposes the deletion of this policy. The proposed policy gave clear guidance as to how biodiversity was to be protected in the context of subdivision applications. The Council now intends to rely on New Policies 3.1 and 3.8, which do not give the same level of guidance as previously.
23. Forest & Bird seeks the retention of the policy as amended by the proposed amendments in Variation 1, but with the reference to 'sensitive natural features' deleted.

24. Proposed Policy 3.8 - Cumulative effects. Forest and Bird opposes the deletion of this policy. The policy gave clear guidance on how cumulative effects on biodiversity would be managed. Council now intends to rely on New Policies 3.1 and 3.8, which are too high level to give adequate guidance. Forest and Bird seeks the retention of this policy, with amendments if necessary to only refer to biodiversity (both significant biodiversity and biodiversity not meeting the criteria in New Policy 3.7).
25. Proposed policy 3.12/New Policy 3.8 - Management Approach to Biodiversity Protection. Forest and Bird opposes the insertion of the words 'where practicable', as these words seriously undermine the policy, and do not accord with RMA requirements. (Forest & Bird notes that these words were inserted by Variation 1, and were not present in the Plan as originally notified, however they do not appear as tracked changes in the Decisions version of the Plan.)
26. Forest & Bird opposes the deletion of the words 'and linkages between' from paragraph (c), as this is an important part of meeting RMA requirements in terms of protecting and maintaining biodiversity.
27. The policy does not give a clear framework for rules on trimming vegetation. Provision is made in the new wording for allowing 'appropriate trimming', and this is reflected in the permitted activity rules which allow trimming of vegetation in several circumstances. However, there is no clear policy basis for rules managing trimming that does not meet the permitted activity standards (and which then becomes a restricted discretionary activity).
28. The policy should include guidance on protecting and maintaining biodiversity that does not meet the significance criteria in New Policy 3.7. This would accord with the Council's RMA obligations, and is particularly important given the deletion of several other policies aimed at biodiversity protection.
29. The phrase 'avoided remedied or mitigated' does not provide clear guidance as to how the hierarchy will apply. The policy should make it clear that avoidance should happen first.

Chapter 3: Rules

30. Proposed Rule 3A.1.5/ New Rule 3A.1.4 Trimming or modification outside urban areas, and outside scheduled areas. Forest and Bird is concerned that the new exemptions to paragraphs (c) and (d), which exempt those paragraphs from operating in the Rural Hills Zone, mean that the Council is not fulfilling its obligation to maintain biodiversity in that Zone. Forest and Bird seeks deletion of the exemptions to (c) and (d).
31. The exemption in standard 2(h) allows for modification or trimming of vegetation planted as amenity planting. Amenity planting is not defined in the Plan. Vegetation that has been planted can over time develop significant biodiversity values. It is inappropriate to have a blanket exemption for 'amenity planting' particularly where there are no parameters around what that means.
32. New Rule 3A.1.8 – Earthworks in all areas. While earthworks in scheduled areas is generally not permitted (because of the operation of Rule 3A.1.6), under this rule it is permitted in all areas (including scheduled areas) for a range of reasons. Earthworks in scheduled areas of significant biodiversity should be a discretionary activity.
33. New Rule 3A.2.1 – Earthworks not permitted by 3A.1.8 – Forest and Bird is concerned that this activity could cause adverse effects on biodiversity, and is not appropriate as a controlled activity. This is particularly the case given the deletion of the matters of control related to biodiversity effects. Earthworks in scheduled areas of significant biodiversity should be a discretionary activity.
35. New Rule 3A.2.2 – Modification of vegetation in scheduled biodiversity areas. Damaged or dead vegetation forms an important part of some ecosystems. The circumstances in which it is allowed to be removed need to be more restrictive if adverse effects on biodiversity are to be avoided. A possible way of doing this would be to require that the two parts of standard (a)(i) are both required to be met (rather than in the alternative), i.e.

...the indigenous vegetation is no longer independently viable and presents a risk of serious harm to people or property, or risks significantly damaging surrounding vegetation.

36. If the above amendment is made, Forest & Bird accepts that controlled activity status is appropriate. If not, the activity should be amended to at least restricted discretionary. In some circumstances it may not be appropriate to allow this modification.
37. Proposed Rule 3A.3.1 – Trimming or modification of vegetation in scheduled areas. Forest and Bird opposes this rule for a number of reasons:
- (a) The activity status of restricted discretionary does not adequately convey the importance of protecting significant biodiversity as required by s6 RMA. Forest & Bird accepts this activity status as being appropriate for trimming, but for modification of significant vegetation, this activity should retain at least discretionary status.
 - (b) If restricted discretionary status is retained, the matters for discretion are incorrectly limited to only matters for conditions, suggesting that consent cannot be declined. Matters for discretion should not be limited to the consideration of the listed matters in terms of conditions – they should also allow decline of consent if appropriate.
 - (c) The problems with this rule, combined with the very high level policy direction for significant biodiversity, will not fulfil Council's RMA obligations in terms of protection significant biodiversity.
38. Proposed Rule 3A.3.3 – Subdivision of land containing indigenous vegetation. Forest and Bird opposes the deletion of this rule. As noted above, no Council can be certain that all significant biodiversity has been included in a survey or Plan schedule. The deletion of this rule removes the ability to identify new areas of significant biodiversity, so that they can be appropriately managed.
39. Proposed Rules 3A.3.7 and 8/New Rule 3A.3.4 Earthworks not complying with permitted activity standards – Forest and Bird seeks that all earthworks in scheduled significant biodiversity areas is discretionary.

40. New Rule 3A.3.8 - Trimming or modification of indigenous vegetation outside urban area that does not meet 3A.1.4 – Forest and Bird seeks that the matters for discretion be amended to recognise that there may be effects on habitats of indigenous fauna that are not a subset of the effects on the indigenous vegetation.
41. New Rule 3A.3.9 Installation etc of network utilities within the dripline of indigenous vegetation in scheduled areas that does not comply with 3A.1.5. Forest & Bird seeks that the matters of discretion are expanded to take into account the effects on habitats of indigenous fauna, not just the effects on the vegetation itself.
42. Proposed Rule 3A.4.2 – Modification of indigenous vegetation that does not meet previous rule standards. Forest & Bird opposes the deletion of this rule.

Chapters 5 Living Zones and 6 Working Zones: Rules

43. Several rules in the Living Zones and Working Zones chapters, amended by Variation 1 (5A.2.2, 5A.3.1, 5A.3.2, 5B.3.3, 5C.2.1, 6A.2.1, 6A.3.1, 6B.2.1, 6B.3.1, 6C.2.1, 6C.3.1, 6D.2.1, 6D.3.1, 6D.3.2, 6E.2.1, 6E.3.1, 6F.2.1, 6F.3.4, 6F.3.5). These rules include as a matter of either control or discretion the following:

The location of any associated building site relative to any (scheduled sites).

44. Merely considering the location of the building site relative to the scheduled sites does not allow for a full consideration of effects on the biodiversity values of that site.
45. Forest and Bird seeks that the matters of control/discretion in all of these rules are amended as follows:

The location of any associated building site relative to, and the effects on, any identified etc.

Other relief

46. Forest and Bird also seeks any other relief:

- (a) consequential on the above relief sought; and/or
- (b) as is necessary to give effect to the relief sought seeks the relief identified above; and/or
- (c) such other relief as may be considered appropriate by the Court and/or the parties in agreement.

Attachments

47. Forest and Bird attach the following documents to this notice:

- (a) Copies of Forest and Bird's submissions;
- (b) Copy of relevant Council Decisions on submissions, including the tracked change Plan excerpts;
- (c) Schedule of names and addresses of persons to be served. Please note that the appeal notice will be served on all submitters, with a covering note to point out that the appeal relates to only certain parts of the Plan. This will be done because a topic-specific list of submitters is not currently available.

Dated 25 January 2018



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Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

To become a party to the appeal, you must,—

- within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33 with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (*see* form 38).

**How to obtain copies of documents relating to appeal*

The copy of this notice served on you does not attach a copy of the appellant's submission and (*or or*) the decision (*or part of the decision*) appealed. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.