

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAUROA**

Decision [2024] NZEnvC 267

IN THE MATTER OF

an appeal under Clause 14 of the First
Schedule to the Resource Management
Act 1991

BETWEEN

C & T ZANT

(ENV-2023-AKL-120)

Appellants

AND

CENTRAL HAWKE'S BAY
DISTRICT COUNCIL

Respondent

Court: Environment Judge MJL Dickey
Environment Commissioner S Myers
Environment Commissioner RM Bartlett

Hearing: On the papers
Last case event: 2 September 2024

Counsel: C & T Zant for themselves
A Davidson for Central Hawke's Bay District Council

Date of Decision: 30 October 2024

Date of Issue: 30 October 2024

DECISION OF THE ENVIRONMENT COURT

A: The appeal is declined and the inclusion of ONF-7 in the proposed Central
Hawke's Bay District Plan is confirmed.

Costs are reserved.



REASONS

A. Background to the appeal

[1] This appeal was filed on 6 July 2023 and relates to a decision of the Central Hawke’s Bay District Council (**the Council**) on the proposed Central Hawke’s Bay District Plan (**PDP**) in relation to zoning of natural features on property owned by C & T Zant (**the appellants**) at 414 Te Apiti Road, RD 14, Havelock North. The relief sought in the appeal related to ONF-7, with the appellants seeking its removal from their land.¹

[2] ONF-7 refers to the Outstanding Natural Feature 7 – Kairakau Coastline which is described in the PDP in a schedule (**NFL-SCHED6**) as follows:

Unique Identifier	Site Identifier	Description of Feature	Site Type (Summary Description of Landscape Values)	Map Reference
ONF-7	Kairakau Coastline	The Kairakau Coastline Coastal escarpment ONF comprises the hills behind Kairakau beach and the Manawarakau Gorge.	<ul style="list-style-type: none"> • Very high landscape values derived from the memorable geological formations which exhibit a visually striking landform. This results in very high expressiveness and aesthetic values, which is coupled with very high cultural values and the ecological significance of parts of these cliffs. • Very high cultural significance of the Manawarakau Gorge including eight nearby Pa sites, urupā and one of the most extensive concentration of pits along the Central Hawke’s Bay coastline. It is also located along the trans-peninsular route stretching from Cape Kidnappers to Cape Turnagain which is plentiful in Māori archaeological sites. 	18 & 57

¹ Statement of Evidence of John Hudson, 7 February 2022. Various issues arose with the relief sought but the Court determined the relief as being confined to removal of ONF-7 from the Zants’ land. Further, it is for note that the Zants purported to file a new appeal dated 18 June 2024 extending the challenge to decisions on the PDP relating to ONF-7, SNA-241, HNC 1, CE, NH and all new environmental designations identified on private property in the PDP. The Court determined that the new appeal was beyond the scope of the appellants’ submissions and the application for waiver to file the new appeal was disallowed. See *Zant v Central Hawke’s Bay District Council* [2024] NZEnvC 175.

[3] The interrelationship between the appellants' property (depicted by the red line) and the boundaries of ONF-7 (depicted by the green line) are shown in the diagrams below.



The Independent Hearing Panel's decision

[4] The appellants' submission sought that there be no SNA (Significant Natural Area) or SLA (Special Landscape Area) on their land. At the hearing of submissions the Zants challenged the appropriateness of the identification of ONF-7 over their land.

[5] The Panel's decision was to reject the appellants' submission. It summarised the Zants' evidence as follows:

[Mr Zant's] main concern is that the ONFL overlay infringed [his] private property rights and the associated loss of value should be compensated.

[6] The decision report noted:

In brief, [the Zants'] concern appeared to be the impact District Plan overlays would have on their private property rights, with implications for the ability of landowners to personally manage and develop their land. Mr and Mrs Zant were also concerned about subsequent and incremental removal of further property rights over time.

[7] It concluded:

ONF-7 (Kairakau Coastline)

9.3.6 The Panel agrees with Council's landscape expert, Mr Hudson that ONF-7 is appropriately reflected in the PDP as an ONF for protection in accordance with s 6(b) RMA. The Panel notes no contrary expert evidence was provided on this matter.

9.3.7 The Panel agrees that reducing the extent of ONF-7 as sought, is not supported, and no changes to Schedule NFL-SCHED6 or the respective overlay on the Planning Maps is recommended.

The Council's decision

[8] The Panel's recommendations were adopted by the Council. The Council recorded that the PDP "strikes the right balance between sustainable economic development for the future and the need to protect our natural resources, landscape and cultural heritage for further generations".

B. The appeal

[9] The appellants sought that the Council's decision to reject their submission on ONF-7 be reversed. An appeal hearing was convened by the Court for 22 August 2024 but did not proceed as the Zants did not wish to be heard. Both parties agreed that the appeal could be determined on the papers.

The appellants' submissions and evidence

[10] The evidence in support of the appeal was set out in a document attached to the appeal titled 'Attachment C'.² The allegations included in Attachment C relate to the Council hearing and are summarised as follows:

- (a) the appellants were denied a balanced discovery and preparation process;
- (b) the appellants experienced prejudice via the selected hearing panel due to their stance on COVID-19;
- (c) there was a conflict of interest within the selected hearing panel;
- (d) the areas identified as significant were altered and increased during the submission process; and
- (e) the hearing panel did not address or respond to all the issues that the appellants presented.

[11] In addition, the appellants filed further submissions dated 21 August 2024 and 2 September 2024 reiterating that they do not consent to any new designations on their property. In support of their submissions the appellants referred the Court to "Property Rights and Environmental Policy: A New Zealand Perspective" by Kevin Guerin.³ We summarise the appellants' submissions as follows:

² A further version of 'Attachment C' was appended to an application to lodge a new appeal which was subsequently declined by the Court in [2024] NZEnvC 175. That version of Attachment C and the one appended to the Zants original appeal are identical except that the later version added the words "and SNA-241" or similar after each reference to ONF-7. The Court confirmed that the challenge to SNA-241 is outside the scope of this appeal and is not discussed further.

³ New Zealand Treasury Working Paper 03/02, March 2003. We also had the benefit of a copy of Mr Zant's evidence to the Hearing Panel.

- (a) The PDP usurps their private property rights. In relation to the areas identified on their property in the PDP, they state that they are willing to enter negotiations for financial transactions to legally transfer their property rights over to the Council. They consider anything other than this to be a theft of their property rights.
- (b) The PDP process should be considered void as it did not consider the potential loss or negative effect the PDP would have on private property rights. The appellants' position is that the Council omitted and excluded experts or consultants that would have addressed the negative effects on property owners and their property rights from the PDP process.
- (c) The Council used the COVID-19 protocols in place during the PDP submission process to its advantage, which prevented the appellants from participating in the PDP process.
- (d) The appeal process has also been limited and has hindered the appellants from accessing a fair and adequate process.
- (e) The matter should be placed on hold pending the outcome of any RMA reform process.

The Council's response to the appeal

[12] The Council submits that there is undisputed expert evidence that the Kairakau Coastline is an ONF.

[13] A matter of national importance, s 6(b) RMA requires the Council to protect outstanding natural landscapes and outstanding natural features (**ONFL**) from inappropriate subdivision, use and development. The Council observes that including ONF-7 in the PDP means that development over a certain level will require a resource consent to assess whether the proposal is "inappropriate", and whether the ONF needs to be protected from that development. Further, the New Zealand Coastal Policy Statement, the National Planning Standards and the Hawke's Bay Regional Coastal Environment Plan all reference ONFL and the need to variously protect and

recognise and provide for them.

[14] The alternative to confirming ONF-7 is to omit it from the PDP, or to amend the boundaries of ONF-7 to exclude the appellants' land. The Council submits that there is no expert evidence to support that outcome. While development would still be regulated by the provisions of the General Rural Zone and any additional overlays (such as the Significant Natural Area and Coastal Environment overlays), it submits that those provisions do not speak to the values of ONF-7 nor ensure it will be protected from inappropriate development.

[15] The Council submits that excluding ONF-7 from the PDP would leave a lacuna where some development may be enabled which would adversely affect the values of the Kairakau Coastline. Such an outcome would be contrary to the obligations in s 6(b) RMA and other statutory documents which give effect to that matter of national importance.

[16] The Council filed evidence from Mr John Hudson, a landscape architect. His evidence addresses the processes concerning the identification of ONF-7 as well as other ONF and Outstanding Natural Landscapes (**ONL**) in the District. He is satisfied that ONF-7 is appropriately reflected in the PDP as an ONF for protection in accordance with s 6(b) RMA.

C. Statutory framework for identifying and protecting outstanding natural landscapes and outstanding natural features under the RMA

A District Plan must comply with directive provisions

[17] Section 73 RMA requires that there must be one district plan for each district at all times and s 74 specifies the matters that the Council must prepare its district plan in accordance with. These include the Council's functions under s 31, the provisions of Part 2, its obligations under s32, the New Zealand Coastal Policy Statement (**NZCPS**) and the National Planning Standards. The PDP must give effect to the NZCPS, the National Planning Standards, the Hawke's Bay Regional Policy Statement and must not be inconsistent with a relevant regional plan.

[18] The Council’s functions for the purpose of giving effect to the RMA under s 31(a) include developing plan provisions “to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district”.

[19] Part 2 comprises the purpose and principles of the RMA. Section 6 contains matters of national importance. Section 6(b) requires the Council to recognise and provide for “*the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development*” as a matter of national importance.

National planning documents

[20] The NZCPS, in particular Policy 15, is relevant to ONFL. It is a national policy document to which regional and district documents must give effect. Policy 15 provides:

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

- (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
- (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment; including by:
- (c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
 - (i) natural science factors, including geological, topographical, ecological and dynamic components;
 - (ii) the presence of water including in seas, lakes, rivers and streams;
 - (iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;
 - (iv) aesthetic values including memorability and naturalness;
 - (v) vegetation(native and exotic);
 - (vi) transient values, including presence of wildlife or other values at certain times of the day or year;

- (vii) whether the values are shared and recognised;
 - (viii) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;
 - (ix) historical and heritage associations; and
 - (x) wild or scenic values;
- (d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and
- (e) including the objectives, policies and rules required by (d) in plans.

[emphasis added]

[21] The National Planning Standards⁴ require certain chapters and sections to be included, if relevant, in a district plan.⁵ One of those chapters (NFL-National Features and Landscapes) was included in the PDP based on expert opinion (Hudson Associates) that there are ONFL within the district.⁶

Regional planning documents

[22] The Hawke's Bay Regional Policy Statement (**RPS**) is contained within the Hawke's Bay Regional Resource Management Plan (**RRMP**). It makes no reference to ONFL and gives no direction on how they should be assessed or where they should be located. The only reference to those matters is within the Hawke's Bay Regional Coastal Environment Plan.

[23] The Hawke's Bay Regional Coastal Environment Plan includes the following relevant objective and policies:

Objective 3.1

Protection of outstanding natural features and landscapes within the coastal environment from inappropriate subdivision, use and development.

Policies

⁴ National Planning Standards, November 2019, Wellington, Ministry for the Environment.

⁵ National Planning Standards, Part 4 - District Plan Structure Standard, mandatory direction 4; see also Part 7 District-wide Matters Standard, mandatory direction 21.

⁶ See also Natural Features and Landscapes, Section 32 Topic Report.

Policy 3.1 To recognise and provide for the protection of the visual coherence of the existing landscape, seascape and outstanding natural features in the coastal environment.

....

Policy 3.3 To ensure the visual quality and the physical and ecological integrity of outstanding natural features and landscapes within the coastal environment are maintained and that such areas be restored and rehabilitated where appropriate.

...

Policy 3.6 To promote the restoration and rehabilitation of identified areas where outstanding natural features and landscapes within the Coastal Environment have been degraded by past activities or may be degraded by proposed activities.

Policy 3.7 To implement the policies set out above predominantly in the following manner:

- (a) resource consents – the policies will primarily be used in the process of making decisions on resource consents in accordance with the RMA;

...

Proposed District Plan

[24] There is a further requirement under s 75 RMA for the PDP to state its objectives, the policies to implement those objectives and the rules to implement the policies. The Council advised that the appellants have not challenged the relevant objectives or policies in the PDP to which the identification of ONF-7 gives effect and that these are now beyond challenge.⁷

[25] The relevant objective is as follows:

NFL-O1 Outstanding natural features and landscapes are retained and protected from inappropriate subdivision, use and development.

[26] Policy NFL-P1 gives effect to that objective by requiring that Council will “*identify the District’s outstanding natural features and landscapes having regard to*” a list of criteria as follows:

1. natural science factors such as geology, biology, ecology and hydrology, including its rarity and vulnerability;
2. perceptual factors, including legibility/expressiveness (such as how

⁷ The content of the NFL chapter was resolved by consent order dated 7 August 2024 with no change being made to the relevant objectives and policies.

obviously the landscape demonstrates the formative processes leading to it), transient values (including the occasional presence of wildlife or other values at certain times of the day or year) and aesthetic values (including memorability and naturalness); and

3. associational factors, including historical associations, value to tangata whenua, and whether values are shared and recognised.

[27] The subsequent policies indicate that some activities will be allowed but the District's ONFL will be protected from adverse effects through a range of means.⁸

[28] Method NFL-M1 explains that identifying and describing the values associated with ONFL in NFL-SCHED6 and on planning maps is a method for implementing the policies.

[29] Section 32 of the RMA requires an evaluation of objectives, policies, rules and other methods by considering them in a way and with regard to s 32(1) and (2). The Council undertook that evaluation, which is contained in the Central Hawke's Bay District Plan Review – Natural Features and Landscapes - Section 32 Topic Report.

[30] The Council submitted that the directive provisions of the RMA and the planning documents produced under it oblige it to identify ONFL within its district and include them in the PDP for the purposes of protecting them from inappropriate subdivision, use and development. Failing to identify and map a feature that has been assessed by an expert landscape architect as being outstanding would put the Council in a position where its PDP failed to meet the requirements of the RMA.

[31] In support of its submission the Council referred to *Environmental Defence Society v Kaipara District Council*,⁹ where the Court made a declaration that a proposed district plan which failed to include provisions that recognised and provided for the protection of ONFL from inappropriate subdivision, use and development contravened the RMA.¹⁰

⁸ Policies NFL-P2 to NFL-P4.

⁹ *Environmental Defence Society v Kaipara District Council* [2010] NZEnvC 284.

¹⁰ *Environmental Defence Society v Kaipara District Council* [2010] NZEnvC 284, at Appendix A.

[32] Accordingly, the Council submitted that it prepared the PDP and identified ONFL within the district in NFL-SCHED6. The PDP included objectives, policies and rules to protect ONFL from inappropriate development. The assessment leading to the identification of ONF-7 is set out below.

D. Landscape values

[33] As part of the development of the PDP the Council engaged expert landscape architects Hudson Associates to undertake a district-wide assessment of the district's landscapes and coastal natural character, in accordance with its obligations under ss 6(b) and 7(c) of the RMA.

[34] Mr Hudson undertook the assessment and noted that the assessment process followed the New Zealand Institute of Landscape Architects Best Practice Guide 10.1, which adopts a similar method to that recognised by the Court in the *Pigeon Bay*,¹¹ and refined by *Wakatipu Environmental Society Inc v Queenstown Lakes District Council (WESI)*.¹² In the *WESI* decision, the Court summarised the factors relevant to identifying ONFL as follows:¹³

Consequently, we have no reason to change the criteria stated in *Pigeon Bay* in any major way. We list them here for three reasons: first, in (a) to add 'ecological' components and to delete 'aspects' and substitute 'components', and secondly to correct the grammar in (c) and (d); and thirdly in (c) to give an alternative for 'expressiveness'. The corrected list of aspects or criteria for assessing a landscape includes:

- (a) the natural science factors - the geological, topographical, ecological and dynamic components of the landscape;
- (b) its aesthetic values including memorability and naturalness;
- (c) its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;
- (d) transient values: occasional presence of wildlife; or its values at certain times of the day or of the year;
- (e) whether the values are shared and recognised;
- (f) its value to tangata whenua;

¹¹ *Pigeon Bay Aquaculture v Canterbury Regional Council* [1999] NZRMA 209.

¹² *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59.

¹³ *WESI*, at [80].

(g) its historical associations.

We should add that we do not regard this list as frozen - it may be improved with further use and understanding, especially of some of the issues we now explore. One aspect that troubles us in particular is that the dictionary senses of landscape as a view of scenery or, perhaps, a collection of views — while included in (b), is given less emphasis than we consider the RMA might suggest. Another matter that needs further consideration is whether (b) might be better expressed in terms of all the amenity values, rather than just one quality - aesthetic coherence.

[35] The process and outcomes of the Hudson Associates Assessment are set out in the report titled “Central Hawke’s Bay District – Outstanding Natural Landscape Assessment”.¹⁴ Thirteen areas in the district were identified as having appropriate qualities for them to be recognised as outstanding natural features or landscapes. Of those, twelve are identified as features and one – the Ruahine Ranges – as a landscape.¹⁵

[36] Having considered the landscape against natural science, perceptual and associated attributes, the coastal area of the Zant’s land, plus adjacent areas, were rated as outstanding natural features. The assessment is outlined in the Hudson Associates Assessment.

[37] In his evidence, Mr Hudson summarised the reasons for the finding that the area constitutes an ONF were:

- 16 ...that the coastal edge has very high values in terms of abiotic geology, aesthetics, and cultural significance from earlier Māori importance. All three factors combined to contribute to the reasons for the area being considered an ONF i.e. there were abiotic (geology), perceptual (aesthetic) and cultural (associational) reasons for an ONF rating.
17. The common factor affecting the coastal length of the ONF is the Limestone rock-type, which is unique for Coastal Central Hawke’s Bay and gives a unifying character to the 5km length of ONF ...
18. limestone rock-type forms the prominent feature of the Mangakuri Gorge near Kairakau settlement... . A mix of Limestone also forms the distinctive cliffs that run along the coastal edge north of the settlement. This same rock-type forms the coastal edge of the Zants’ property. While limestone is present throughout other parts of the district, this 5km stretch

¹⁴ Central Hawke’s Bay District, Outstanding Natural Landscape Assessment, Hudson Associates Assessment, May 2019.

¹⁵ Statement of Evidence of John Hudson, 2 August 2024, at [14].

north from Kairakau is the only location in the district where it interfaces with the sea, contributing to the unique topography of the Kairakau area and indicative of its geological derivation. The cliff area was probably originally uplifted from seabed (thus the Limestone) then formed an island east of an inland sea at Ruataniwha, which was later uplifted.

19. The limestone is unique as a coastal edge. It is relatively hard in comparison with the prevailing coastal mudstone, which is soft, less steep and more eroded and has a white/grey colour. The hardness contributes to steeper coastal faces and landforms in contrast to steepness and colour of the adjacent mudstone to the north and south. The Limestone rock-type forms steeper cliffs than mudstone as a consequence of the coastal erosion, contributing to the high aesthetic values of this short stretch of coastline.
20. The area of coast has cultural associations and was well used by Māori for fishing. The three rocks off the coast are known as Hinemahanga Rocks, named after the floats of Hinemahanga's fishing net. Her husband was Chief Patea, who reputedly pushed Hinemahanga off the cliffs due to his shame over her fishing success while he was inland hunting birds for food. The area formed part of the seasonal food source in conjunction with inland areas such as Lake Hatuma and also formed part of the coastal route for travel. This information was sourced from writings by Pat Parsons and verified during the review by Dr Maaka.
21. ONF-7's aesthetic appeal derives from the steep Limestone cliffs, the dramatic Mangakuri Gorge and the enclosed sandy beach. It is one of a handful of beaches accessible along the Central Hawkes Bay coastline.

E. The process of development of the PDP

[38] The Council's s 32 Report outlined the consultation that was undertaken with potentially affected landowners through a mailout to all landowners identified as having ONFL on their property. They were invited to meetings with staff and consultants and to provide feedback on the ONFLs. A draft district plan was published and hearings were held by a District Plan Committee on the 37 informal submission points by 14 submitters.¹⁶

[39] The proposed ONFLs were then included in the PDP for notification and were subject to submissions, including from the appellants. All 24 submissions, and 10 further submissions, on the Natural Features and Landscapes section were fully assessed in the Council's s 42A report, which was divided into 7 'Key Issues'. Key

¹⁶ Central Hawke's Bay District Council District Plan Review, Natural Features and Landscapes Section 32 Topic Report, May 2021, at [3.5].

Issue 7 considered the schedule of ONFL, which included ONF-7. All of the submissions were considered with regard to the expert evidence of Mr Hudson, who continued to support the listing of ONF-7.¹⁷

[40] There was then a hearing on 14-15 March 2022 at which the Independent Hearing Panel heard evidence from submitters, including Mr Zant. The Panel's decision findings are set out earlier in this decision.

[41] The Panel's recommendations were then considered, endorsed and formally adopted by the full Council as set out earlier in this decision.

[42] The Zants challenged the PDP process and outlined concerns about discovery, the impacts of their stance on COVID-19, Hearing Panel conflicts of interest, alterations to significant areas between notification of the PDP and Council decisions, and that the Hearing Panel did not address or respond to all the issues they raised.

[43] We summarised these concerns earlier in this decision. Many of their concerns are not relevant to our decision on the appropriateness of including ONF-7 in the PDP. However we address more fulsomely their allegations of conflicts of interest and the Panel's failure to respond to all issues.

[44] The Zants claim that three of the Panel members were Central Hawke's Bay District Councillors. They claim 'an obvious prejudice given they had skin within this PDP that identified ONF-7'. They note their request to replace those councillors was denied. They claim that prejudice tainted the hearing process and made it unfair.

[45] They also claimed that the Panel did not address or respond to all the issues they presented.

Evaluation of process

[46] We have found from the information available to us that the Zants were given a fair opportunity to make a submission on the PDP, and that they made submissions

¹⁷ Statement of Evidence of John Hudson, 7 February 2022.

to the Hearing Panel. We are unaware as to how or when COVID-19 restrictions might have impacted their involvement in the process. The record demonstrates that they attended the hearing.¹⁸

[47] The allegations of bias of the Hearing Panel because of the Zants' stance on COVID-19 is unsupported by any evidence. The Zants also raised concerns that three councillors were on the Panel, alleging bias because they are councillors and it is the Council's plan. However, s 34A of the RMA allows a local authority to appoint councillors as hearing commissioners. Further, there is clear judicial authority to the effect that, in the circumstances of a plan review, a councillor exercising their duties by hearing and considering submissions is not such as to give rise to bias.¹⁹

[48] As to the Zants' claim that not every aspect of their submissions was responded to, the Council is required to give a decision on the provisions and matters raised in a submission in accordance with Clause 10 of the First Schedule to the RMA. The Council's decision must have three elements:²⁰

Firstly, a determination should state whether the local authority accepts or rejects in whole or in part each and every submission on a specific provision or matter.

Secondly, the provision determination in the case where submissions are accepted in whole or in part. This should identify what:

- (a) Change is to be made to one or more provisions in the proposed plan; or
- (b) Provision is to be deleted; or
- (c) New provision is to be made to the proposed plan.

Finally, each decision should contain its reasons.

[49] The Council's decision met these requirements. The Council is also not required

¹⁸ Hearing Panel Decision section 1.5, Table 1.

¹⁹ *Anderton v Auckland City Council* [1978] 1 NZLR 657, at page 87 where the Court noted that "...the tendency to favour its own scheme change must have been implicitly recognised by the legislature in constituting the Council the primary adjudicative tribunal". "... what must be proven is actual pre-determination of the adjudicated question."

²⁰ *Queenstown Lakes District Council v Marcam Grand Lakes Ltd* EnvC C156/02, 22 November 2002.

to refer to all the evidence considered in reaching its decision.²¹ In any event the allegations are not relevant to this appeal as the Court's hearing process offered an opportunity to the Zants to challenge the identification of ONF-7 afresh.

F. Impact of ONF-7 on property rights

[50] The Zants' primary concern relates to the impact of ONF-7 on their property rights.

[51] The Council addressed their concerns in its legal submissions.

ONF-7 does not enable public access

[52] The Zants claimed that the scheduling of their land would enable public access to and over their land. The Council clarified that it has no power to enable public access to private land via the PDP, nor sites listed as ONFL.

[53] It submitted that there is no relationship between recognition of part of the appellants' land as an ONF and a current or future right for the public to access that part or any other part of the appellants' land.

[54] We agree. There is no basis for the claim that public access to the Zant land will be enabled.

ONF-7 does not unreasonably limit the appellants' use of their land

[55] The Zants describe the scheduling of ONF-7 on part of their land as a 'land grab', and suggest that compensation should be paid to them.

[56] The Council accepts that ONF-7 will restrict the appellants' private property

²¹ See for example *Rodney District Council v Gould* (2004) 11 ELRNZ 165; [2006] NZRMA 217, at [43] and [113] where the High Court held that the Environment Court, in conducting a hearing is not obliged to refer to all the evidence heard in the course of an appeal and give reasons for rejecting or accepting that evidence. Such requirements would have significant implications for the ability of the Court to perform its functions. The same principal applies to hearings and decision making at Council level.

rights to the extent that certain activities within the ONF portion of their land may require resource consent. However, it submitted that those restrictions are fair and reasonable in the context of the public interest in protecting ONFs in the District. In addition, it submitted that any restrictions on private property rights are expressly enabled by the RMA and are in place for valid resource management reasons.

[57] The Council submitted that a key purpose of the RMA and the PDP is to control the use of land to achieve sustainable management of natural and physical resources, and that it is well accepted that the RMA expressly empowers the restriction of property rights where necessary to achieve the purpose of the RMA. It referred to *Falkner v Gisborne District Council*²² where the High Court held:

The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea, and air. There is nothing ambiguous or equivocal about this. It is a necessary implication of such a regime that common law property rights pertaining to the use of land or sea are to be subject to it.

[58] The Council acknowledged that s 85 RMA provides opportunities for relief in limited circumstances where restrictions on land render it incapable of reasonable use. “Reasonable use” is defined to mean the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.²³

[59] The evidential burden for establishing a s 85 claim is on the owner. In this case the Council submitted that the appellants have not provided any evidence which supports a claim that the ONF-7 notation precludes reasonable use. For example, the appellants have never given evidence of an activity they would like to undertake within ONF-7 that is precluded by the PDP as a result of rules attaching to ONF-7. Even if there was such an activity, the Council submitted that its potential effects on the environment would need to be demonstrated to not be significant in order to be relevant to whether it was a reasonable use.

²² *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC).

²³ Section 85(6) RMA.

[60] In addition, it submitted that it is also important that what constitutes “reasonable use” is assessed from the perspective of the public interest. In *Hastings v Auckland City Council*, the Court held:²⁴

... the test to be inferred from section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. But the focus is on the public interest, not the private property rights.

[61] The Council submitted that any restriction associated with having ONF-7 listed in the PDP is justified by the public interest in achieving sustainable management by providing for a matter of national importance. It submitted that:

- (a) Any restriction on the ability for the appellants to develop part of their land arises from the rules that apply to ONF-7, rather than the recognition of ONF-7 as outstanding per se. Cases such as *Man O'War Station v Auckland Council* confirm that the mapping of an outstanding natural feature or landscape is conceptually separate from determining the restrictions that should apply to the landscape, and the mapping of an ONF is not dependent on the protection afforded to that landscape by the planning instrument.²⁵
- (b) The rules regulating development within ONF-7, as mapped on the appellants' property, are appropriate considering the outstanding nature of the Kairakau Coastline. These rules have not been appealed.

²⁴ *Hastings v Auckland City Council* (ENC Auckland A068/01) at [98].

²⁵ *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24 at A.

- (c) The requirement to obtain consent does not necessarily prevent reasonable use under s 85 RMA.²⁶ Furthermore, any restriction on property rights in the sense of needing consent for development is not solely a result of ONF-7, and would not necessarily be addressed by removing ONF-7. For example the Ecosystems and Indigenous Biodiversity rules that apply both inside and outside Significant Natural Areas (particularly within the Coastal Environment), and the General Rural Zone rules that apply to the whole site, may well require consent to be sought for development along the coastal frontage of the site.
- (d) ONF-7 only applies to a relatively small portion (43.42 ha) of the appellants' overall landholding which is 487.84 ha (8.9%). Over 90% of the appellants' land is unrestricted.

[62] In their submissions the Zants relied, among others, on a paper prepared by the New Zealand Treasury on "Property Rights and Environmental Policy: A New Zealand Perspective".²⁷ They say it supports their position on the inherent unlawfulness of identifying part of their land as ONF-7, raising the issue of compensation for lost use of land. They submitted:²⁸

This paper is very applicable for this case. It very much describes property rights, the different categories thereof, and even details these rights in the current scenario of the attempted RMA takings by district plans.

[63] The Council, in reply, noted that section 6.1 of the Paper acknowledges:

The main vehicle for adjusting property rights in New Zealand is the Resource Management Act 1991 (RMA) through the preparation of ... district plans, and their application by ... territorial authorities to requests for consent to build on or otherwise use land.

These ... plans, and the way they are applied act to constrain, enforce and modify property rights in land. Those modifications are not compensable. ... the RMA explicitly states that plan provisions are not deemed to have taken or injuriously affected interests in land unless the Act explicitly says so... This is effectively parliament contracting out, through statute, from the application

²⁶ *Coleman v Kingston* (HC Auckland AP103-SW00), 3 April 2001 at [48] upholding the Environment Court's finding to this effect as a matter of fact.

²⁷ Property Rights and Environmental Policy: A New Zealand Perspective, New Zealand Treasury Working Paper 03/02, March 2003.

²⁸ Appellants' submissions, dated 21 August 2024, at page 2.

of a takings approach to land use regulation.

[64] We accept the Council's submissions on this matter. We find that scheduling part of the Zants' land is not a 'land grab', nor does it constitute an unreasonable fetter on their rights. It is an appropriate response to the work undertaken to identify outstanding natural features and landscapes in the district.

[65] For completeness, we note that the Zants urged us to delay resolving their appeal because the Government has signalled an intention to repeal that part of the RMA which enables the identification of significant natural areas on private property. We do not find it appropriate to delay the determination of the appeal pending such a process given no legislation has yet been enacted. In any event, their appeal concerns an outstanding natural landscape feature, not a significant natural area.

F. Conclusions

[66] The Council is obliged, in preparing its district plan, to provide for matters of national importance (in this case s 6(b)), and to give effect to the NZCPS and the NES-Planning. The Council called evidence from Mr Hudson, who outlined his assessment of the district's ONFL and his conclusion that ONF-7 is an outstanding natural feature.

[67] No expert evidence was called to challenge Mr Hudson's findings and we accept them.

[68] We were told that the PDP contains objectives, policies, rules and methods which regulate activities on land that has been scheduled. Those provisions are not under appeal and are therefore beyond challenge. We do not, therefore, address whether or not those provisions give effect to s 6(b) or the national planning documents because that is not a matter that is before us. To the extent, however, that the Council has identified and scheduled ONF-7 as an outstanding natural feature, it has met its obligations under the RMA and those documents.

Outcome

[69] The appeal is declined and the inclusion of ONF-7 in the proposed Central Hawke's Bay District Plan is confirmed.

[70] Costs are reserved.



MJL Dickey
Environment Judge

