

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC129

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for declarations under
section 311 of the Act

BY THE AUCKLAND COUNCIL

(ENV-2010-AKL-000241)

Applicant

25 MAY 2011

Court: Environment Judge J R Jackson
Environment Commissioner K A Edmonds
Environment Commissioner C M Blom

Venue: Auckland

Hearing: 28, 29 and 30 March 2011
(Final submissions received 6 April 2011)

Appearances: H J Ash and D K Hartley for the applicant
A E Cornor for the Upper Hutt City Council
D A Allan and K R Sergeant for Waitakere Ranges Protection
Society Incorporated and the Environmental Defence
Society Incorporated (section 274 parties)
Ms H Massey for the Tree Council Incorporated (section 274
party)
D J Minhinnick and M D Lichtwark for Vector Limited (section
274 party)
Dr J Seakins for himself (section 274 party)

Date of Decision: 19 May 2011

Date of Issue: 20 May 2011



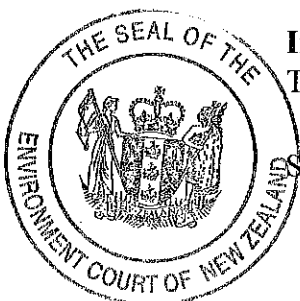
DECISION

- A: Under section 313 of the Resource Management Act 1991 the Environment Court declares that:
- (1) section 152(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 relating to the revocation of existing rules providing for protection of trees, does not apply to the rules in the North Shore District Plan and Waitakere District Plan described in the Schedule to this Decision as they fall within the exception provided in section 152(3) of the Simplifying Act for rules relating to a tree or group of trees specifically identified in a plan or proposed plan.
 - (2) That the rules referred to in the Schedule now have and will continue:
 - (a) from the date of this decision to have legal effect to the extent required by the rule(s) in respect of the trimming of trees or groups of trees specifically identified in the rules listed in the Schedule to this decision; and
 - (b) from 1 January 2012 to have legal effect so as to manage felling, damaging or removing trees specifically identified in the rules listed in the Schedule to this decision to the extent required by the rule(s).
- B: Leave is reserved for the Auckland Council to apply, on notice to the Environment Court to amend those declarations to give fuller or better effect to the Reasons below.
- C: Under section 313 of the Act the Environment Court declines to make a declaration in respect of the rule in Table 17B.8 Long Bay Structure Plan Activities – Protection Areas in Proposed Plan Change 6 (Long Bay Structure Plan Stage 2) to the North Shore City District Plan.
- D: There is no order for costs, since none were sought.

REASONS

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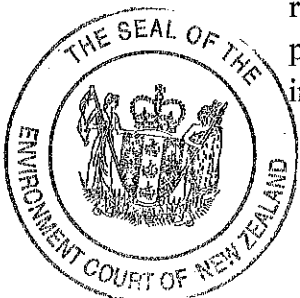


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Introduction

The issue : do certain district rules comply with the 2009 Amendment to the RMA?

[1] Are people free to cut down trees in their gardens? That is a question raised in this proceeding concerning the powers of territorial authorities to maintain rules in district plans protecting trees under the Resource Management Act 1991. The question arises as a result of the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 which we will call "the Simplifying Act". More precisely, the issue is whether the provisions of certain rules in the district plans of the former North Shore City and the Waitakere City are rules about a "tree or groups of trees ... specifically identified in the plan" for the purpose of transitional section 152 of the Simplifying Act so that they will continue in effect after 1 January 2012.



Scope of the application for declarations

[2] To establish whether the rules about trees with which they are concerned are legal, the North Shore City Council, Waitakere City Council and Auckland Regional Council (“the Councils”) applied on 10 September 2010 for declarations under the Resource Management Act 1991 (“the RMA” or “the Act”) that:

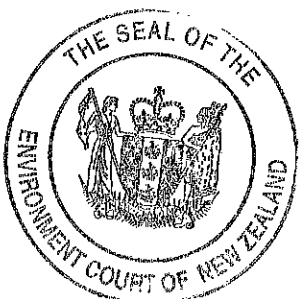
- (a) section 152(1) of the ... [Simplifying Act] relating to the revocation of existing rules providing for protection of trees, does not apply to the rules described below due to the exception provided in section 152(3) of the [Simplifying] Act for rules relating to a tree or group of trees specifically identified in a plan or proposed plan:

North Shore District Plan

- (i) Rule 8.4.6.2 ... relat[ing] to Notable Groves of Trees depicted in the North Shore City District Plan Maps and listed and described in Appendix 8C: Schedule of Notable Trees of the North Shore City District Plan.
- (ii) Rule 8.4.6.1.3(a)(i) ... applying to any pohutukawa tree of 3 metres or more in height located within the Coastal Conservation Area or in the area of Lake Pupuke Site of Geological Significance 3 shown on the North Shore City District Plan Maps.
- (iii) Rule 8.4.6.1.3(a)(ii) applying to any native vegetation within the foreshore yard and any vegetation (excluding invasive weed species) within the 30 metre lakeside yard shown on the North Shore City District Plan Maps.
- (iv) Rule 8.4.6.1.2 (e) applying to any native vegetation (including the roots) when it is part of a continuous, naturally occurring area of native vegetation in the Residential 2A, 2A1 and 2B Zones in the North Shore City District Plan.
- (v) Rule 8.4.6.1.2 (b) applying to any native tree of 6 metres or more in height or 600mm or more in girth (measured at 1.4 metres above the ground) or any exotic tree of 8 metres or more in height or 800mm in girth (measured at 1.4 metres above the ground) in the Residential 2B Zone in the North Shore City District Plan.
- (vi) The rule in Table 17B.8 Long Bay Structure Plan Activities – Protection Areas in Proposed Plan Change 6 (Long Bay Structure Plan Stage 2) to the North Shore City District Plan, that relates to the alteration, or removal, of any native vegetation as it applies to the Landscape Protection Area - Conservation and the Riparian Margins shown on the land use strategy map at Appendix 11A and additional controls map at Appendix 11B of Proposed Plan Change 6.

Waitakere City District Plan

- (vii) Managed Natural Area Rule 2 Vegetation Alteration of the Natural Areas Rules ... relat[ing] to land within the Bush Living Environment in the urban environment shown on the Waitakere City District Plan Maps.
- (viii) Riparian Margins/Coastal Edges Natural Area Rule 2 Vegetation Alteration of the Natural Areas Rules ... relat[ing] to land in the urban environment within the Riparian Margins/Coastal Edges Natural Area shown on the Waitakere City District Plan Maps.



- (b) That the rules referred to in (a)(i) to (viii) above will continue to have legal effect in the circumstances prescribed above from 1 January 2012.

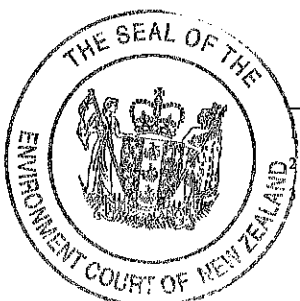
[3] The Councils' proceedings were taken over¹ by the new Auckland Council on 1 November 2010 under the Local Government (Tamaki Makaurau Reorganisation) Act 2009. The Auckland Council's application was supported by the Waitakere Ranges Protection Society Incorporated ("WRPS") and the Environmental Defence Society Incorporated ("EDS") and by the Tree Council Incorporated. It was opposed by Vector Limited and by Dr Seakins². Other persons who had given notice that they wished to be heard did not attend the hearing.

Background : managing trees in the district plans

[4] The North Shore City District Plan ("the North Shore plan") and the Waitakere City District Plan ("the Waitakere plan") currently include rules protecting trees in a range of circumstances. Those rules were promulgated under the general power of a territorial authority to make rules as conferred by section 76 of the RMA.

[5] On 1 October 2009 the Simplifying Act came into force. It added provisions to the RMA which are at the heart of these proceedings. First a new section 76(4A) and (4B) of the RMA were added³ which now qualify the general rule-making power by adding:

- (4A) However, a rule must not prohibit or restrict the felling, trimming, damaging, or removal of any tree or group of trees in an urban environment unless the tree or group of trees is—
- (a) specifically identified in the plan; or
 - (b) located within an area in the district that—
 - (i) is a reserve (within the meaning of section 2(1) of the Reserves Act 1977); or
 - (ii) is subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987 or the Reserves Act 1977.
- (4B) In subsection (4A), **urban environment** means an allotment no greater than 4 000 m²—
- (a) that is connected to a reticulated water supply system and a reticulated sewerage system; and



Section 35 Local Government (Tamaki Makaurau Reorganisation) Act 2009.
Dr Seakins withdrew during the hearing.
By section 59 of the Simplifying Act.

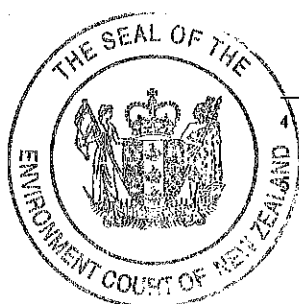
- (b) on which is a building used for industrial or commercial purposes, or a dwellinghouse.

[6] Further, in relation to rules about trees, the Simplifying Act makes its effects at least partly retrospective. Section 152 of the Simplifying Act, purporting⁴ to be a transitional provision, states:

Existing rules providing for protection of trees

- (1) On 1 January 2012, an existing rule or part of a rule in a district plan or proposed district plan that prohibits or restricts the felling, damaging, or removal of any tree, or group of trees, in an urban environment is revoked without further authority than this section.
- (2) On the commencement of this section, an existing rule or part of a rule in a district plan or proposed district plan that prohibits or restricts the trimming of any tree, or group of trees, in an urban environment is revoked without further authority than this section.
- (3) Subsections (1) and (2) apply unless the rule relates to a tree, or group of trees,—
 - (a) specifically identified in the plan or proposed plan; or
 - (b) located within an area in the district that—
 - (i) is a reserve (within the meaning of section 2(1) of the Reserves Act 1977); or
 - (ii) is subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987 or the Reserves Act 1977.
- (4) Each local authority must, before 1 January 2012,—
 - (a) amend any rule in its plan or proposed plan to which subsection (1) applies; and
 - (b) use the Schedule 1 procedure in the principal Act to make the amendment.
- (5) In this section, **urban environment** has the meaning given in section 76(4B) of the principal Act.

The definition of urban environment⁵ has the effect that section 152 of the Simplifying Act only applies to lots of 4,000 m² or less in urban areas which are already developed and contain at least one building. It also distinguishes between the activities of felling a tree and merely trimming it. The effect of section 152(2) is that trimming rules were revoked in 2009 when the Simplifying Act came into force (1 October 2009). The effect of subsection (1) is that on 1 January 2012, an existing rule or part of a rule in a district plan or proposed district plan that prohibits or



We are unclear as to whether a retrospective enactment can be truly described as 'transitional'.

In section 76(4B) of the RMA.

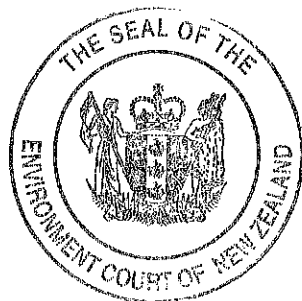
restricts the felling, damaging, or removal of any tree, or group of trees in an urban environment will be revoked without further authority other than that section.

[7] An exception to subsections (1) and (2) is provided in section 152(3)(a) of the Simplifying Act for rules relating to a tree or group of trees specifically identified in a plan or proposed plan and it is that exemption which is the subject of these proceedings.

[8] Section 152(4) is rather obscure. Although its meaning is not a question we have to determine in these proceedings, it might be useful if we point out that a local authority is not, despite the words in section 152(4), necessarily obliged to go through the Schedule 1 process in all situations. If a territorial authority is content for the section 152(1) or (2) revocation to continue then, in our view, to avoid any confusion inherent in having words revoked by statute still visible in its plan it may simply excise those rules. It could achieve that either by applying to this court under section 292 of the RMA, or preferably by exercising its power in Clause 16(3) of the First Schedule without further formalities after 1 January 2012. Only if the territorial authority wants to substitute valid rules under section 76(4A) of the RMA for those which section 151(1) and (2) of the Simplifying Act – about removal – makes illegal on 1 January 2012 does it need to go through the process outlined in subsection (4). Otherwise some territorial authorities are going to incur quite unnecessary costs to remove revoked rules.

[9] The reason for this proceeding is that the Auckland Council is uncertain as to whether the exception in section 152(3)(a) will apply to the district plan and proposed plan rules referred to in its application. It wishes to obtain the court's view as to the correct interpretation of section 152 of the Simplifying Act and whether the rules the subject of its application will contravene that section of the Simplifying Act from 1 January 2012. Consequently, the issues for the court to resolve are:

- (a) what is the correct construction of the phrase "... tree or group of trees specifically identified in a plan ..." in section 152(3) of the Simplifying Act?
- (b) which of the Auckland Council's tree rules put before us fall within the exception in section 152(3)?
- (c) what, if any, declarations can and, in our discretion, should we make?



What does section 152 of the Simplifying and Streamlining Act 2009 mean?

The proper approach to interpretation

[10] First, we have to interpret and then apply the provisions of section 152 of the Simplifying Act. In *Air Nelson Limited v New Zealand Amalgamated Engineers etc Union*⁶ the Supreme Court recently warned New Zealand courts not to confuse interpretation of a statute, with its application. It pointed out that construction is a question of law, and application is a question of fact. However, that court was concerned with the application of legislation to a particular set of facts, not with the situation before us which is how to apply legislation which Parliament has decided should apply (retrospectively) to subordinate legislation made under the unamended principal statute. In these rather unusual circumstances it seems to us that we are concerned principally with questions of law and policy and not with questions of fact.

[11] Where particular difficulties of interpretation of section 152(3) of the Simplifying Act arise is in establishing the meaning of a “group of trees ... specifically identified ...” in a district plan. In attempting to understand what Parliament meant we should apply section 5 of the Interpretation Act 1999. That states:

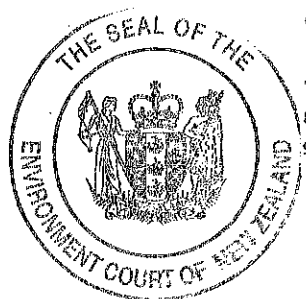
5. Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

In summary, we must look at the text of section 152 in context and in the light of its purpose, and we may look at other indications.

[12] Although the Interpretation Act 1999 elsewhere defines⁷ and refers⁸ to an “Act” as a whole, the term “enactment” is also defined as meaning⁹ “the whole or a portion of an Act or regulations”. So when considering the matters listed in section 5 of the Interpretation Act we must ascertain the meaning of section 152 from the

⁶ *Air Nelson Limited v New Zealand Amalgamated Engineers etc Union* [2010] NZSC 53; [2010] 3 NZLR 433 (SC).
⁷ Section 29 (Definitions) of the Interpretation Act.
⁸ e.g. Section 8 of the Interpretation Act.
⁹ Section 2 of the Interpretation Act.



purpose of the enactment, i.e. section 152 and/or the Simplifying Act as a whole, and from the enactment with a big 'E' – that is, the RMA itself.

[13] All the aids to ascertaining meaning identified in section 5 of the Interpretation Act 1999 are within the Act being interpreted. However, there is high authority that external aids such as the Parliamentary debates (as recorded in Hansard) may also be examined : *New Zealand Maori Council v Attorney-General*¹⁰. This was recently confirmed by the High Court as a correct approach to amendments of the RMA : *Art Deco Society (Auckland) Incorporated v Auckland City Council*¹¹. Since the parties resorted to Hansard we will attempt to gain some guidance from it, if we need to.

[14] To qualify under the exception in section 152(3) of the RMA an existing or proposed rule about trees must:

- (1) relate to a tree or
- (1A) relate to a group of trees which
- (2) in either case must be specifically identified in a district plan or proposed plan.

We now consider those components in turn.

The meaning of the text in context

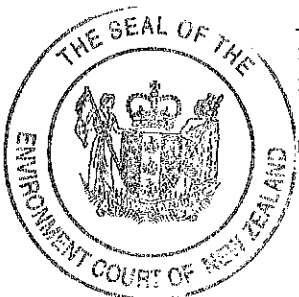
What is a tree?

[15] This is one of those legal questions that appears to defy common sense : everyone thinks they know a tree when they see one. The *Shorter Oxford Dictionary*¹² defines a “tree” as:

A woody perennial plant, typically having a single stem or trunk growing to a considerable height and bearing lateral branches at some distance from the ground. More widely, any bush or shrub of erect growth with a single stem. Also any of certain herbaceous plants, such as the banana, with a very tall but not woody stem.

The term “trees” has been defined in other legislation such as the Forests Act 1949. There “trees” are defined to include:

not only timber trees, but also other kinds of trees, shrubs, and bushes, seedlings, saplings, cuttings, suckers, and shoots of every description.



¹⁰ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 658 (CA).
¹¹ *Art Deco Society (Auckland) Incorporated v Auckland City Council* [2006] NZRMA 49 at para [34].
¹² *The Shorter Oxford English Dictionary*, 6th Edition, OUP, 2007

Both definitions include shrubs, seedlings and saplings which most people would not think of as “trees”, only as “potential trees”.

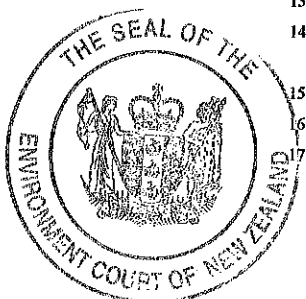
[16] While none of the terms are defined in the RMA, ‘vegetation’¹³, ‘plants’¹⁴ and ‘trees’ are all used in the Act. The Act contains two references to “any tree or other vegetation” : in section 108(2)(c) – “the protection, planting, or replanting of any tree or other vegetation” – which empowers conditions on resource consents which are also capable of being used as threshold activity standards; and in section 314(4) – “including the planting or replanting of any tree or other vegetation” (enforcement order). However, ‘plants’ sometimes appear to be a generic term for trees and other vegetation. For example, the “use” of land includes as part of its meaning¹⁵:

Any destruction of, or damage to, or disturbance of, the habitats of plants ... in, on, or under the land.

The removal of a tree is a use of land under section 9 because of that definition – *Burton v Auckland City Council*¹⁶ – and so tree removal could, at least until the Simplifying Act came into force, be managed under a general rule in a district plan. We were informed from the bar that it was the operation of “blanket” rules in the Auckland City Plan which was a main cause of the Simplifying Act’s amendments to section 76 of the principal Act.

[17] Obviously by using the term “tree” in section 76(4A) of the RMA and in section 152 of the Simplifying Act, Parliament intended to differentiate trees from other vegetation and other plants and perhaps from juvenile trees and saplings. Consequently it is tempting to suggest a minimum height for a “tree” to distinguish it from other plants. The potentially wide definition of a tree is a good reason for district plans to adopt height and girth minima as thresholds in their rules. “Woody vegetation over six metres high” has been a useful working definition in many rural districts for over two generations. However, there is an increasing tendency to reduce the minimum height of a tree to three metres¹⁷, and in the end the use of a threshold height is arbitrary and/or a matter of convenience.

[18] Because a minimum height is arbitrary and itself introduces a degree of specificity we will rely on the first sentence of the dictionary definition quoted



¹³ ‘Vegetation’ is referred to in sections 6(c), 108(2)(c) and 314(4) of the RMA.
¹⁴ ‘Plants’ are referred to in the definitions of ‘natural and physical resources’, ‘use’ and ‘wetland’ in section 2.
¹⁵ Section 9(4)(c) of the Act.
¹⁶ *Burton v Auckland City Council* [1994] 1NZRMA 544 at p. 15 (HC).
¹⁷ See Hon. Mr Smith in *Hansard* 8 September 2009, 657 NZPD 6233-6234.

above, that is a tree is “A woody perennial plant, typically having a single stem or trunk growing to a considerable height and bearing lateral branches at some distance from the ground”. Of course district plans may contain their own definitions of trees which, in the absence of any definition in the Act itself, will prevail over our definition.

What is a group?

[19] The Shorter Oxford English Dictionary defines ‘group’ as¹⁸ (relevantly):

1. spec. a. *Fine Art.* An assemblage of figures or objects forming together either a complete design or a distinct portion of one.
 - b. *Mus.* ... Series of notes, or small time-value, grouped together; a division or run.
2. gen. An assemblage of objects standing near together, and forming a collective unity; knot (of people), a cluster (of things). In early use there is often a notion of confused aggregation.
3. A number of persons or things in a certain relation, or having a certain degree of similarity.
4. *esp.* in scientific classification. Chiefly used as an indefinite term for any classificatory division whatever its relative rank (so, e.g., in Zoology).

...

[20] The New Zealand Oxford English Dictionary defines ‘group’ as (relevantly):

1. a number of persons or things located close together, or considered or classed together.
- ...
4. a number of commercial companies under common ownership.
- ...
6. a division of an air force or air-fleet.

We have omitted particular definitions pertaining to mathematics and chemistry and because trees are rooted to the ground we have also omitted any definition with an active verb (such as a ‘rock group’). The fine art example, on the other hand, points to an assemblage whose components are not necessarily adjacent to each other but are organised by form or function.

[21] We conclude provisionally that a “group” seems to comprise individuals related to each other by association, form or function. Thus a “group of trees” in the context of section 152 of the Simplifying Act may be, in the natural and ordinary meaning of the phrase, a number of trees which are either physically close to each



¹⁸ Shorter Oxford English Dictionary 3rd Edition OUP (1985 corrections) p. 896.

other (in the same area) or which otherwise form a collective or functional unity, or which share some other common characteristics.

How does one specifically identify a group of trees?

[22] When used in a scientific context the phrase “specifically identify” would mean to identify a tree according to its binomial name, that is by identifying its genus and species¹⁹, for example pohutukawa (*Metrosideros excelsa*). However, it is unlikely that Parliament intended that specific identification means simply giving the scientific name, because if it had, Parliament would simply have omitted the words “... or group of trees” from section 152(3) as Mr Cornor pointed out.

[23] In any event, here it is not the scientific meaning but the ordinary meaning of “specifically identify” that we need to establish. “Specifically” is an adverb derived from the adjective ‘specific’. Of the three dictionaries we have looked at, only the 6th Edition of The Shorter Oxford English Dictionary separately defines “specifically”²⁰:

a. in respect of specific or distinctive qualities; b. peculiarly; c. in a clearly defined manner, definitely, precisely.

The first definition roughly reflects an approach to meaning that suggests an objective is a collection of qualities, the second and third tend to suggest an object has an essence which can be identified.

[24] The Sixth Edition of The Shorter Oxford English Dictionary states:

Identify – establish the identity of; establish who or what a given person or thing is; recognise.

We have omitted all transitive meanings where ‘identify’ is followed by ‘with’ since they are not relevant.

[25] Section 152(3) requires that any “group of trees” also “be specifically identified” in a rule in a district plan. We conclude – again provisionally – that there is a range of possible meanings of the phrase “... a group of trees specifically identified ...” in the relevant plan. We identify two reasonable end points in the range. The most restricted meaning is : ‘a number of trees classified as to genus and species located close together at a place described in the district plan’. A more general meaning is ‘a number of trees within an area or which form a unit which is



¹⁹
²⁰

Rule 23.1 of the *International Code of Botanical Nomenclature* (the Vienna Code).
The Shorter Oxford English Dictionary, 6th Edition OUP 2007.

described with reasonable accuracy in the district plan'. Obviously there is a number of variations between those two outer limits of reasonable construction. To ascertain what meaning of the phrase was intended by Parliament we must next refer to the purpose of the enactment.

Purpose

[26] We infer that the procedural purpose of section 152(3) of the Simplifying Act is to preserve any rule which a territorial authority does not need to amend under subsection (4) because that rule already complies with the requirements of tree rules in the new section 76(4A) and (4B) as added by the Simplifying Act.

[27] There is no express purpose stated for section 152 of the Simplifying Act but that is not surprising since it is only a transitional provision. Section 76(4A) and (4B) of the RMA as added by the Simplifying Act, use similar wording but since those subsections have no express purpose either, that similarity does not help.

[28] It may be more useful to consider section 152 in the context of, and having regard to, first the whole of the Simplifying Act and secondly the purpose of the RMA as a whole. In particular section 152 of the Simplifying Act must be construed so as to achieve the wider purpose set out in section 5 of the principal Act. The first part of the RMA's purpose is (relevantly) to manage the use, development and protection of natural resources in a way or at a rate which enables people and communities to provide for their wellbeing, health and safety. In making decisions as to how to achieve that territorial authorities must pay particular regard to²¹ – amongst other things – the efficient use of natural and physical resources. In relation to uses of land a subsequent power²² given to territorial authorities to manage land use implicitly recognises that it is preferable to assume that efficiency is achieved by letting market forces and property rights work until it is shown under section 32 of the Act that they cause outweighing externalities, in which case a rule may be justified.

[29] Section 5 of the RMA also has a second component which is that the enabling of people and communities to get on with their lives must occur while certain other matters are achieved. These are²³:

- sustaining the potential of resources to meet the reasonably foreseeable needs of future generations;



²¹

Section 7(b) RMA.

²²

Section 9 RMA.

²³

Section 5(2)(a) to (c) of the RMA.

- safeguarding the life-supporting capacity of air, water, soil and ecosystems;
- avoiding, remedying or mitigating any adverse effects of activities on the environment.

Sections 6 to 8 then state various general principles which guide local authorities as to how to achieve the section 5 purpose of sustainable management of resources. These sections are important in the context of this case not only because they flesh out the fundamental purpose of the RMA, but more particularly because they give some definition to the aspects of association, form and functionality in the concept of a “group”.

[30] The effect of sections 5 to 8 is that when considering any issues about trees in urban gardens a district plan needs to weigh enabling people to achieve their wellbeing by trimming or cutting down trees for the usual reasons (to give sunlight, open up views, prevent root damage to drains or structures, and reduce leaf scatter) against, amongst other things, recognition and preservation²⁴ of the natural character of the coastal environment and the margins of the coast, lakes and rivers; protection²⁵ of outstanding natural features and landscapes from inappropriate use; and protection²⁶ of areas of significant indigenous vegetation and significant habitats of indigenous fauna. Further, the district plan should have particular regard to the intrinsic values²⁷ of ecosystems, the maintenance and enhancement²⁸ of the quality of the environment (and of amenity values²⁹) and to any finite characteristics³⁰ of natural and physical resources.

[31] Trees are, by definition, characteristics of forest ecosystems where they occur. Within such ecosystems trees usually provide the shading and protective canopy and are an important component of one aspect of the purpose of the RMA. They directly safeguard the life-supporting capacity of ecosystems, and indirectly they contribute to the life-supporting capacity of air, water and soil by absorbing³¹ CO₂, by removing nitrogen and pollutants, and by slowing down run-off of

²⁴ Section 6(a) of the RMA.

²⁵ Section 6(b) of the RMA.

²⁶ Section 6(c) of the RMA.

²⁷ Section 7(d) of the RMA. The definition of ‘intrinsic values’ (of ecosystems) in section 2 RMA states that they include:

(a) their biological and genetic diversity; and

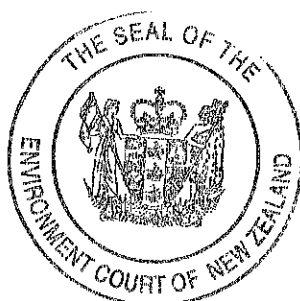
(b) the essential characteristics that determine an ecosystem’s integrity, form, functioning and resilience.

²⁸ Section 7(f) of the RMA.

²⁹ Section 7(c) of the RMA.

³⁰ Section 7(g) of the RMA.

³¹ Obviously one tree in a garden will not store much carbon, but there are cumulative effects issues here also.



stormwater. These indirect functions are often called ecological and/or biodiversity “services” (see *Friends of Shearer Swamp v West Coast Regional Council*³²). Trees may also be important natural resources in the margins of the coastal environment and along rivers and around lakes. Their protection from inappropriate use and development may be a matter of national importance³³ depending on circumstances. We record that the Auckland Council lodged affidavits showing that tree rules in both the North Shore plan and the Waitakere plan were at least in part put in place to protect trees contributing to those functions; and we later quote briefly from the relevant parts of those plans.

[32] Trees may also contribute to the naturalness of outstanding natural features and landscapes³⁴ or be part of areas of significant indigenous vegetation³⁵ and significant habitats of indigenous fauna. Again their protection in those situations is a matter of national importance under section 6 of the Act. Thus the purpose of the RMA requires “ecosystems”, “the coastal environment”, “landscapes”, “areas of ... vegetation” and “habitats” to be recognised and protected as separate entities and/or as components of the environment³⁶. There is nothing in Part 2 of the Act which suggests that one particular natural resource – the anthropocentric and rather arbitrary concept of a ‘tree’ within the kingdom of plants – should invariably be treated as separate from the various other components of the environment which we have identified above. To the contrary, Part 2 of the RMA generally takes a more scientific and inclusive approach to both plants and animals as natural resources by treating them as “constituent parts”³⁷ of ecosystems.

[33] The relevance of ecosystems to these proceedings is that trees, especially native trees, contribute to many ecosystems’ integrity, form, functioning and resilience. For example: around Auckland there are mangrove ecosystems on the edge of bays – as an intermediate ecosystem between the sea and more terrestrial ecosystems; on and above cliffs on the Waitemata Harbour there are the increasingly geriatric remnants of pohutukawa forest ecosystems; and the Waitakere Range forests spill into the suburbs of Laingholm and Titirangi.

[34] Section 152 of the Simplifying Act goes some way towards recognising those matters by confining its application to developed land in the urban environment – that is, to sections of 4,000 m² or less which are built on and have certain services

³² *Friends of Shearer Swamp v West Coast Regional Council* [2010] NZEnvC 345 at 5.

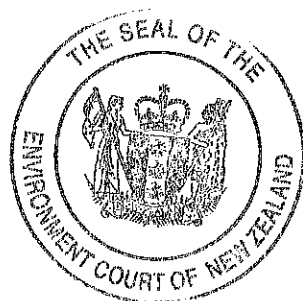
³³ Section 6(a) of the RMA.

³⁴ Section 6(b) of the RMA.

³⁵ Section 6(c) of the RMA.

³⁶ Also a defined term: see section 2 of the RMA – it includes “Ecosystems and their constituent parts ...”.

³⁷ See the previous footnote.



provided. However, there are, in some districts – such as the former North Shore City, Waitakere City and Upper Hutt City (all represented at this hearing) – areas of urban land which appear to contain natural resources which come under sections 6(a), (b) and (c) and section 7(d) of the RMA as outlined.

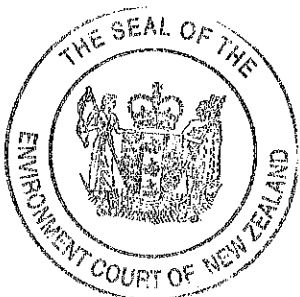
[35] It appears open for a territorial authority to have promulgated rules, after carrying out a section 32 evaluation, protecting vegetation in an identified ecosystem, for example (to take an extreme case for simplicity) by prohibiting damaging or felling of all vegetation. If section 152(3) is read literally it may not protect any trees described generally in a rule as part of an ecosystem in the urban environment after 1 January 2012. That would lead to the absurd result that any vegetation big enough to be a tree could be cut down legitimately (as a tree) but using a weed eater, slasher or chainsaw on other vegetation or plants that are not trees would be an offence under the RMA.

[36] While we respect and take very seriously the rights of owners to cultivate their own gardens, the RMA's purpose may in certain circumstances also justify a council exercising its powers (subject to the safeguards discussed above) to make rules both to deal with the externalities of unnaturally concentrated stormwater, fertiliser, sediment, reduction in property values and visual amenities that unvegetated urban environments contribute to the wider environment, and to protect section 6(a) to (c) and 7(d) values. In some cases it may be that the costs and benefits of a rule that describes a 'group of trees' in a more general way than by identifying each tree saves more money – and is thus more efficient – than does requiring the territorial authority to identify each and every tree by species and location.

[37] We conclude that the wide purpose of the Act with its inclusion of the complexities of ecosystems, habitats and landscapes – none of which readily align with property boundaries – leads towards a wide reading of the phrase "... group of trees ... specifically identified" in a district plan.

Scheme of the RMA

[38] In interpreting section 152 of the Simplifying Act we may also look at the "... format and scheme of the enactment". Here "enactment" means the Simplifying Act and/or particularly the principal statute, that is the RMA.



[39] In passing we note that quite an important component of the scheme of the RMA is the definition of “effect”³⁸. That term is defined to include cumulative³⁹ effects. Because “effects” are defined inclusively, the term also includes accumulative effects – effects which are more or less likely to occur. Individual landowners often have the attitude – “why can’t I cut my tree down? – there are plenty of others around to maintain amenities and value”. However, if too many landowners took that approach the surrounding and downstream ecosystems, amenities and value might be degraded. That is why local authorities need to look at the bigger picture in relationship to accumulative effects, particularly when preparing district plans. In our view that may justify a local authority having a tree rule over a larger rather than a smaller area.

[40] Having set out the purpose of the Act in Part 2, and various duties and restrictions in relation to land, water and air in Part 3, the functions of local authorities are set out in Part 4. Section 31 states that the functions of territorial authorities are (relevantly) to establish objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and the associated natural resources of the district⁴⁰, and to control the actual or potential effects of the use, development or protection of land for maintenance of indigenous biodiversity⁴¹. That has important consequences because it strengthens the concept that district plans need to be read as a whole.

[41] The classical statement of the correct approach is in the decision of the Court of Appeal in *J Rattray and Son Limited v Christchurch City Council*⁴² where Woodhouse P wrote:

... [A]ssistance not only may but ought to be sought from the composite planning document taken as a whole whenever obscurities or ambiguities seem to arise.

That case was decided under the Town and Country Planning Act 1977. However, the Court of Appeal decided in *Powell v Dunedin City Council*⁴³ that *Rattray* is still the “starting point” on interpretation of district plans under the RMA. *Powell* itself was about a vehicle access rule in section 20 (Transportation) of the Dunedin City Plan. The Court of Appeal concluded on interpretation of the rule that⁴⁴:

³⁸ Section 3 of the RMA.

³⁹ Cumulative effects are additive effects which “will” occur : *Dye v Auckland Regional Council* [2001] NZRMA 513; [2002] 1 NZLR 323 at [38].

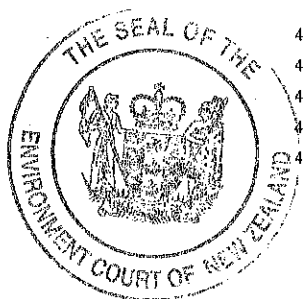
⁴⁰ Section 31(a) RMA.

⁴¹ Section 31(b) RMA.

⁴² *J Rattray and Son Limited v Christchurch City Council* (1984) 10 NZTPA 59 at 61.

⁴³ *Powell v Dunedin City Council* [2005] NZRMA 174; (2005) 11 ELRNZ 144 at para [30].

⁴⁴ *Powell v Dunedin City Council* [2005] NZRMA 174; (2005) 11 ELRNZ 144 at para [30].



While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Ratray*, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20 [of the Dunedin City Plan]) and, where any obscurity or ambiguity arises, it may be necessary to refer to the sections of the plan and the[ir] objectives and policies ...

What is important about *Powell* is its confirmation that a rule in a district plan under the RMA must be read in the light of the objective and/or policy which it seeks to implement.

[42] Returning to the scheme of the RMA : there are three sets of procedural safeguards in the Act to minimise the possibility that a local authority could put in place ill-considered or unbalanced objectives, policies and/or rules about trees (or anything else). First any rule must be designed to implement specified objectives and policies in the district plan (which every territorial authority must⁴⁵ have). Section 74 sets out the matters to be considered by the territorial authority – most notable is Part 2 of the Act – when preparing its district plan. Section 75 sets out what must be contained in the district plan – including a statement of objectives, policies and rules (if any). A rule may apply in part of a district⁴⁶, and be specific or general⁴⁷ in its application. Obviously there is now a limit on how general a rule about tree trimming or removal may be as a result of the Simplifying Act⁴⁸.

[43] In her submissions in reply Ms Ash pointed out that the Simplifying Act also introduced⁴⁹ some changes to the RMA as to when rules in proposed district plans and changes have legal effect. The new section 86B of the (principal) Act provides that generally a rule only has legal effect once a decision on submissions is made and notified. But that is subject to an exception in section 86B(3). That states:

- (3) A rule in a proposed plan has immediate legal effect if the rule –
- (a) protects or relates to water, air, or soil⁵⁰ (for soil conservation); or
 - (b) protects areas of significant indigenous vegetation; or
 - (c) protects areas of significant habitats of indigenous fauna; or
 - (d) protects historic heritage; or
 - (e) provides for or relates to an aquaculture management area.

⁴⁵ Section 73 of the RMA.

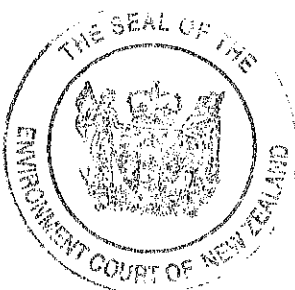
⁴⁶ Section 76(4)(a) and (b) of the RMA.

⁴⁷ Section 76(4)(d) of the RMA.

⁴⁸ Section 76(4) RMA is of course now subject to section 76(4A) and (4B) as added by the Simplifying Act.

⁴⁹ Section 68 of the RM (Simplifying and Streamlining) Amendment Act 2009.

⁵⁰ We see problems looming with interpretation of subsection (3)(a) – many rules at first sight relate to water, air or soil.



There is implicit recognition that rules regarding the purpose of the RMA or matters of national importance (as (a) to (d) are) should have legal effect upon notification, that is immediately. Very often rules protecting areas of significant indigenous vegetation also protect automatically the trees which are part of that vegetation. In our view that suggests Parliament in section 152 of the Simplifying Act was thinking of a wider meaning of the phrase “group of trees”, so that it might be trees protected as an area of indigenous vegetation. At the very least, as Ms Ash pointed out, the Simplifying Act contemplates continuation of rules protecting areas of significant indigenous vegetation.

[44] A second safeguard for property rights on the one hand, and for proper ecological concerns on the other, is that before any proposed district plan is notified a territorial authority must evaluate its proposed objectives, policies and methods under section 32 of the Act. In particular, policies and methods must be evaluated by taking into account their benefits and costs⁵¹ and the risk of acting or not acting if there is uncertain or insufficient⁵² information about their subject matter. This section 32 evaluation is reinforced by the efficiency principle in Part 2 of the Act. There section 7(b) requires that any person exercising powers under the RMA must have particular regard⁵³ to the efficient use of natural and physical resources.

[45] The third procedural safeguard in the scheme of the RMA is that to ensure such conflicting matters as private property rights and ecosystem considerations are only interfered with or damaged where it is efficient and effective⁵⁴ to do so, there are rights of appeal⁵⁵ to the Environment Court on the contents of district plans and on resource consent decisions. That right of appeal reflects Parliament’s view that the large and most overtly subjective decisions have already been made by Parliament and are stated in Part 2 (Purpose and Principles) of the RMA. Subsequent decisions as to the contents of district plans are intended by Parliament to be more specifically effective and economically efficient⁵⁶. Hence the right of appeal to a court with a majority of members having expertise⁵⁷ in those areas (amongst others). That both gives safeguards against inefficient restrictions on people’s (and communities’) abilities to maintain and improve their wellbeing, and increases the probability that some ecosystems and other section 6 values with non-human time scales are not irrevocably damaged by short-term political decisions.

⁵¹ Section 32(4)(a) of the RMA.

⁵² Section 32(4)(b) of the RMA.

⁵³ Section 7(b) of the RMA.

⁵⁴ The test in section 32(3) of the RMA.

⁵⁵ Under Clause 14 of the First Schedule to the Act.

⁵⁶ Section 32 of the RMA.

⁵⁷ Section 253 of the RMA.

The Environment Court is a back-stop to check effective compliance with Part 2 of the RMA.

[46] In summary the scheme of the Act attempts to ensure that district rules about trees⁵⁸ are carefully designed and put in place only after consideration of multiple, often conflicting matters, a cost-benefit analysis and with a level of independent, careful and reasoned scrutiny that higher (and necessarily more subjective) legislation cannot always receive.

Extrinsic aids

[47] Looking at the history of the Simplifying Act we were referred to these explanations (amongst others) of the purpose of the tree provisions:

- At its introduction the explanatory note to the Bill stated it was to⁵⁹:

... delet[e] existing blanket tree protection rules in urban areas and prohibit ... local authorities from imposing rules of this type in the future.

- The Local Government and Environment Select Committee report stated⁶⁰:

Clause 52 would amend section 76 of the principal Act by prohibiting local authorities from making blanket tree protection rules that would apply in an urban environment unless the tree or group of trees was specifically noted in a schedule to the district plan, or located within a reserve or area subject to a conservation management plan or strategy ...

Clause 52 refers only to trees or groups of trees "specifically identified in a schedule to the plan". We are aware that most territorial authorities use schedules in conjunction with maps and symbols to identify a tree or group, and that although maps are useful aids for identification they are generally not included as a schedule but in the plan itself. We therefore recommend that clauses 52 and 151 be amended to refer to a plan, which would include any schedule in which trees were listed.

We take the view that the intent of the proposed provisions is to reduce the time and cost of applying for and processing resource consents for relatively minor matters. Blanket protection rules could still apply to trees in an urban area that were located in a reserve or conservation area. For trees in other urban areas the bill would continue to allow individual trees and groups of trees to be protected



⁵⁸

Amongst many other natural and physical resources.

⁵⁹

Resource Management (Simplifying and Streamlining) Amendment Bill 2009 (18-1) (explanatory note) at 2.

⁶⁰

Resource Management (Simplifying and Streamlining) Amendment Bill 2009 (18-2) (explanatory note at 30-31).

by listing in a district plan. We also observe that the principal Act is not the only means of promoting tree coverage in urban areas and that the bill does not prevent councils from offering incentives for planting, maintenance, or voluntary protection by way of covenants.

We note that local authorities may need to review their current practices for listing trees and groups of trees, as the tree or group will have to be identified specifically in the plan if it is to be protected. To list a group of trees, considerable detail might be required, including the species, the number of trees, and their precise location. We also note that local authorities may need to update their plans for some groups of trees to make references to some protected groups of trees more specific.

[Emphasis added]

We consider it is important that the Select Committee did not state that the scientific name (the species) must be stated, only that in some cases a rule might require it.

[48] During the Second Reading the Honourable Dr Nick Smith (Minister for the Environment) said⁶¹:

... an underlying principle is that before a council restricts what homeowners can do with their own trees, the council should consult them and go through a process of listing those trees, or groups of trees, in a district plan or schedule

– and finally, during the Third Reading the Minister for the Environment said⁶²:

There are generic rules in a few councils; plans where every tree over a particular height, say 3 metres, requires consents to trim or remove them. National's change means that if a council wants to put restrictions on landowners trimming or removing a tree on their property, the council needs to consult the property owners and specifically identify the tree or groups of trees in its district plan. The Government recognises that there are significant trees on private land that have wider community benefits. That is why we are providing for councils to specifically list those trees or groups of trees for protection, albeit councils will have to consult the property owner.

[49] Relying on those and similar extracts from Hansard, Mr Minhinnick, for Vector, submitted that both limbs of section 152(3) take an areal or locational approach:

- (i) The first limb refers to trees "specifically identified". Vector says this requires precise identification and location.



⁶¹

8 September 2009, 657 NZPD 6134.

⁶²

8 September 2009, 657 NZPD 6233-6234.

- (ii) The second allows more general protection without specific identification where a tree or group of trees falls within certain specified areas. It is only in those areas⁶³ that a blanket approach can be taken.

If you broaden the first limb of section 152(3) to include general areas, as submitted by the Council, then the second limb becomes redundant. The two limbs must mean different things.

[50] We do not accept that argument. First, if “group of trees specifically identified ...” was intended by Parliament to have an areal characteristic in all cases, then section 152(3) would have read:

- (3) Subsections (1) and (2) apply unless the rule relates to a tree, or group of trees located in an area,—
- (a) specifically identified ... or
 - (b) ... in the district that —
 - (i) is a reserve ...

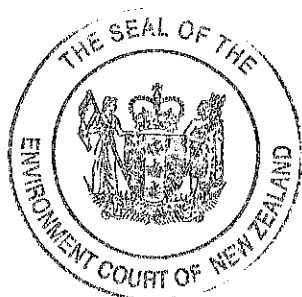
Of course, defining a group of trees by reference to an area on a map will usually be highly desirable, on the “picture is worth a thousand words” principle. However, it is not essential. Secondly, reserves and areas under management plans are ways of identifying some areas, but it is more consistent with the purpose and scheme of the RMA to leave it open to local authorities to protect other areas of trees for aims relating (for example) to section 5(2)(a) and (b), section 6(a) to (c) or section 7(d).

[51] It appears that Parliament believed that ‘blanket’ tree rules are not justifiable in cost-benefit terms, although none of the debate referred to us contains any analysis of the issue. We were referred by a counsel to a report⁶⁴ (“the TAG report”) which apparently led to the tree provisions in the Simplifying Act. That states⁶⁵:

The Ministry [for the Environment] advises us that approximately 4,500 consents are issued annually to allow the trimming, pruning and removal of non-scheduled trees in a relatively small number of urban Councils. This represents about 10% of the national total [of] consent ... applications for very little gain, as virtually all are, we understand, granted.

We consider that such an ill-targeted rule is inappropriate, and propose that councils should not be able to impose such rules.

No evidence was given to us as to the accuracy of the information on what that report was based. Regrettably the report omits to tell the reader important details such as how many of the applications were for removal of the tree, and how many of



⁶³ Located in a reserve or area subject to a conservation management plan or strategy.
⁶⁴ Technical Advisory Group Report February 2009 p. 17.
⁶⁵ Technical Advisory Group Report February 2009 p. 17.

those resulted only in trimming or pruning. There is a considerable difference in outcomes which the Technical Advisory Group appears to have overlooked. For example, trimming a tree is often a pragmatic, compromise solution where an application for removal had been made. The telling statistic would have been how many applications for removal resulted only in trimming.

[52] The TAG report is also worryingly simplistic in that it does not refer to the facts that trees may provide unvalued but important ecosystem services or benefits (as ecological and/or biodiversity services and/or as positive externalities), or may be part of nationally important areas under section 6 of the Act or that removal of single trees, apparently innocent enough in itself, may have harmful accumulative effects over a wider area. In fact, as Mr Allan submitted of the Waitakere plan:

trees constitute the canopy of [an] ecological system and if they are retained there is a better chance of retaining the integrity of the system. The rules are not concerned with the protection of individual trees but with their retention as part of an ecological system.

With the substitution of 'less' for 'not' in the last sentence, we agree.

[53] In summary we find that the history of the Simplifying Act shows that the mischief it is designed to prevent is blanket rules over districts which protect all trees from trimming or felling. That does not assist much in ascertaining the meaning of the phrase "... a group of trees ... specifically identified". Indeed, as we have seen, the Parliamentary Select Committee deliberately eschewed any reinforcement of the idea that the scientific (binomial) name of a tree must be stated in a rule about tree removal.

Conclusions

[54] We now pull together the different indications as to the meaning of section 152(3) of the Simplifying Act and draw some conclusions that will inform our consideration of the legality of the individual rules. While we accept that the word 'specifically' adds an element of precision to the description of a group, we conclude that a broader interpretation of a 'group of trees' is justified than mere proximity. A 'group of trees' may be clearly described in a district plan either as a number of trees located (relatively) close together, e.g. in a catchment, or an embayment, or along a coast; or classed together in some other way, most importantly by ecological function.

[55] District plans often contain a rule prescribing the level of protection for a tree by species or common name of a tree at a street address (usually in a schedule of 'Protected Trees') and/or by indicating the location of the tree on a map with a marginal description relating back to a schedule. In the case of a 'group of trees' the



degree of precision is different from what is required for a 'tree' or there would have been no need to include the concept of a 'group'.

[56] We conclude that a full definition of what is meant by "... group of trees ... specifically identified" in section 152(3) of the Simplifying Act is too difficult to express briefly, but that the phrase includes any of the following sets:

- (1) a cluster of trees identified precisely⁶⁶ by location (usually by street address and/or legal description);
- (2) all trees of one or more named species in a defined area or zone;
- (3) all trees in a class with defined characteristics in a defined area or zone;
- (4) all trees in a named ecosystem (usually natural rather than artificial) or habitat or landscape (unit) or ecotone⁶⁷,

-- and the set (usually) implements specific objectives and policies in the district plan.

[57] We have in effect determined that a rule which controls all trimming, felling of "exotic trees over x metres high" in a defined (Living) zone may be legitimate⁶⁸ under section 152(3) of the Simplifying Act, depending on the wording of the objectives and policies which such a rule implements. That may come as a surprise to some but we consider it must have been the level of specificity that Parliament intended when it introduced the Simplifying Act because clearly it did not intend to alter Part 2 of the Act in any way. If Parliament had intended a stricter result the exception in subsection (3) would have referred to a "... tree identified in a plan by botanical name and precise location".

How does section 152 affect the questioned district plans?

Interpreting district plans

[58] We now turn to apply our conclusions in paragraph [56] to the questioned rules about trees. We bear in mind that although rules under section 76 of the RMA are not regulations⁶⁹ within the meaning of the Interpretation Act 1999 the Court of Appeal has -- in the decision we have already referred to (*Powell v Dunedin City*⁷⁰) -- applied section 5 of the Interpretation Act 1999 to district plan rules. The Court

⁶⁶ As to the need for precision : *Christchurch City Council v The Halswell Residents Association Incorporated*, High Court, Christchurch CIV 2008-409-002930 (Panckhurst J, 17 September 2009).

⁶⁷ An ecotone is a transitional area or edge between two ecosystems.
⁶⁸ Whether it was originally justifiable under section 32 is another issue.
⁶⁹ Section 2 of the Interpretation Act.

⁷⁰ *Powell v Dunedin City Council* [2005] NZRMA 174; (2005) 11 ELRNZ 144 (CA).



approved⁷¹ the reasoning of Chambers J in *Beach Road Preservation Society Incorporated v Whangarei District Council*⁷² where he held that because under section 76(2) of the RMA rules in district plans have the effect of regulations, the Interpretation Act 1999 applies to the interpretation of such rules.

The North Shore District Plan

[59] First it is important to note that the North Shore plan contains extensive statements about the natural resources of the (former) City and the issues that the RMA raises in respect of them. Examples of objectives and policies relevant to this proceeding are contained under two headings. First:

8.3.1 Coastal Conservation⁷³

Objective

To protect the natural character, public access, cultural heritage values, ecology and landforms of the coastal environment.

– and a relevant implementing policy⁷⁴:

...

Policies – Natural Values

5. By protecting native coastal vegetation, in particular pohutukawa trees, for amenity, ecological and land stability purposes.

...

Policies – Hazard Mitigation

16. By restricting earthworks and removal of vegetation within the Coastal Conservation Area, particularly on steep, unstable or erosion-prone land.

[60] Secondly, under the heading and objective⁷⁵:

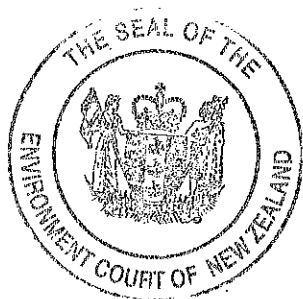
8.3.2 Ecosystems

Objective

To protect and enhance significant habitats of native fauna and flora to maintain biodiversity, and for their intrinsic, educational and recreational values.

– we find the following policies⁷⁶:

⁷¹ *Powell v Dunedin City Council* [2005] NZRMA 174; (2005) 11 ELRNZ 144 at para [33].
⁷² *Beach Road Preservation Society Incorporated v Whangarei District Council* [2001] NZRMA 176 at para [34].
⁷³ North Shore plan p. 8-4.
⁷⁴ North Shore plan p. 8-5.
⁷⁵ North Shore plan p. 8-8.
⁷⁶ North Shore plan p. 8-8.



Policies – General

1. By scheduling significant ecosystems and habitat areas in the District Plan and indicating these areas on the District Plan Maps as Sites of Special Wildlife Interest (SSWI).

...

Policies – Protection

...

4. By ensuring that development in the Coastal Conservation Area is located, designed and constructed so as to avoid the need for removal of coastal and estuarine vegetation and avoid any disturbance or destruction of wildlife habitats and their values, shellfish beds, rocky shore ecosystems, and important fishery habitats.
5. By ensuring that development and activities in the Coastal Conservation Area do not adversely affect the proper functioning of ecosystems, including those below mean high water springs.
6. By avoiding earthworks and vegetation removal affecting ecosystems and habitats.

[61] With those objectives and policies in mind we now turn to the rules in relation to which the Auckland Council seeks declarations.

The Notable Trees rule

[62] The North Shore plan also has a rule (one of the subjects of these proceedings) relating to “Notable Trees”. The rule⁷⁷ expressly refers to those trees contained in the “Schedule of Notable Trees in Appendix 8C” and this states that:

Any trimming, alteration or removal of any Notable tree ...
– is a discretionary activity.

[63] If one then turns to Appendix 8C which is headed “Schedule of Notable Trees” one finds that trees are listed street by street (in alphabetical order) under the following five columns:

(1)	(2)	(3)	(4)	(5)
Street Number	Description of tree(s) and legal description	Common (and - usually - scientific name)	Category	Tree Number Map Ref

The categories in column (3) are⁷⁸:

- A Most Significant Trees
- B Historic Trees
- C Rare or Unusual Trees



⁷⁷ Rule 8.4.6.2 [North Shore City Plan, Vol 2].
⁷⁸ Appendix 8C : Schedule of Notable Trees (North Shore City Plan, Vol. 2 p. 8-45).

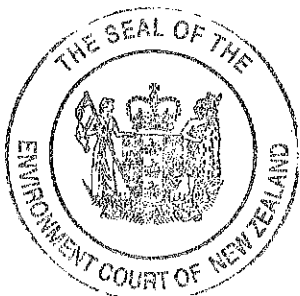
- D Trees of Local Significance

[64] Three examples are:

14	(Arawa Ave) ⁷⁹	2 Pohutukawa (<i>Metrosideros excelsa</i>)	D	105	32
8-12	(Awanui Street) ⁸⁰	Palms Pt Lot 4 DP 3444 and Lot 1 DP 192659 Those remaining of 40 palm species planted by Clement Wragge from 1910	B	40	30
-	Seaview Avenue	All trees on the defined land with a height of more than 3.5 metres or a trunk with a circum- ference of more than 0.5 metres measured at 0.5 metres above ground level. The land is generally the land on the slopes arising from Little Shoal Bay	D	201	30

[65] An issue raised was a 'clouding' depiction used on the district plan maps to represent the spatial extent of the (usually) contiguous vegetation for a 'grove' of trees at a particular location referred to in the Schedule. The legend accompanying the planning maps lists the clouding symbol as referring to a Notable Group of Trees. We find not only that the group of trees has their description and location clearly set out in Schedule 8C, but their location and spatial extent is also sufficiently confirmed by the clouding notation on the Plan maps, notwithstanding the small degree of uncertainty introduced by the scalloping.

[66] We consider that in the context of the full and careful set of objectives and policies contained in the North Shore plan those examples – and the Schedule approach generally – variously fall within sets (1), (2) and (3) of our interpretation of section 152(3) set out above. Thus the rules will continue in force after 1 January 2012.



⁷⁹ Appendix 8C : Schedule of Notable Trees (North Shore City Plan, Vol. 2 p. 8-48).
⁸⁰ Appendix 8C : Schedule of Notable Trees (North Shore City Plan, Vol. 2 p. 8-49).

Rule 8.4.6.1.2

[67] A further set of more complicated rules in the North Shore District Plan was also the subject of the Auckland Council's application. Section 8 : Natural Environment of the North Shore District Plan contains⁸¹ the following rules:

8.4.6.1.2 Limited Discretionary Activities

The following shall be Limited Discretionary activities, which require a resource consent, with no application fee in the first instance:

- a) Any alteration or removal within the Residential 1, 2C, 3, 4, 5, 6 and 7 zones, Residential Expansion zone and Areas B, C, and D of the Structure Plan zones of:
 - i) Any native tree of 8 metres or more in height or 800 mm or more in girth (measured at 1.4 metres above the ground), and
 - ii) Any exotic tree, of 10 metres or more in height or 1000 mm or more in girth (measured at 1.4 metres above the ground) with the exception of any of the species listed in Appendix 8D, and
 - (iii) Any exotic tree, of 15 metres or more in height or 1500 mm or more in girth (measured at 1.4 metres above the ground) belonging to any of the species listed in Appendix 8D.
- b) Any alteration, or removal of any native tree of 6 metres or more in height or 600 mm or more in girth (measured at 1.4 metres above the ground) or any exotic tree of 8 metres or more in height or 800 mm in girth (measured at 1.4 metres above the ground) in the Residential 2B zone.
- c) ...
- d) The alteration or removal of any continuous area of native trees or plants, including undergrowth, in excess of 100 m² in Area B – Large Lot Residential, Area C : Standard Residential, Area D : Varied Residential and Mixed Use Overlay Area.
- e) The alteration or removal of any native vegetation (including the roots) when it is part of a continuous, naturally occurring area of native vegetation in the Residential 2A, 2A1 and 2B zones.

...

8.4.6.1.3 Discretionary Activities

The following shall be Discretionary activities, which require a resource consent, with no application fee in the first instance:

- a) Any trimming, alteration, or removal of:
 - i) Any pohutukawa tree, *Metrosideros excelsa*, (including the roots) of 3 metres or more in height located within the Coastal Conservation Area, or in the area of Lake Pupuke Site of Geological Significance 3.
 - ii) Any native vegetation within the foreshore yard, and any vegetation (including invasive weed species) within the 30 metres lakeside yard.
 - (iii) Any tree (native or exotic) which is the subject of a covenant or condition to a resource consent or subdivision consent.

...

[Underlining added]



Only the underlined sub-rules are the subject of the Auckland Council's application.

[68] The underlined rules all appear to fall into at least either set (2) or set (3) of the methods of specifically identifying groups of trees which we have identified, that is they are identified either as all trees of a named species (pohutukawa) or as all trees in a specified class in a defined area. The specified classes here being:

- “native trees of 8 metres or more in height or 800 mm or more in girth ...”
- exotic tree ... of 10 metres or more in height or 1000 mm or more in girth ...”

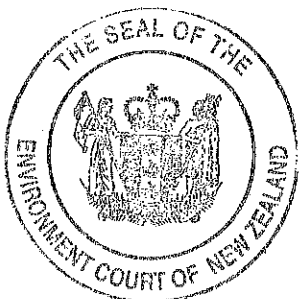
The areal descriptions are either a defined area (e.g. the Coastal Conservation Area in rule 8.4.6.1.3) or the named and specific zones as shown on the district planning maps. The rationale for the trees' protection is clearly set out in the objectives and policies of the North Shore plan. Thus the rules all comply under section 152(3) of the Simplifying Act. In coming to that determination we should not be regarded as having any view on the merits of the rules.

The Waitakere District Plan

[69] With the Waitakere plan we enter an even more complex plan. Reflecting that the former City's urban area is between greater metropolitan Auckland and the Waitakere Ranges to the west and the Manukau Harbour to the south, it contains a full set⁸² of general “themes” including a “green network”⁸³ to recognise the natural and physical framework of the city.

[70] The second issue⁸⁴ to which objectives and policies is directed is the effects on native vegetation and fauna habitat. Objective 2 in the Waitakere plan is⁸⁵ to protect the City's native vegetation and fauna habitat including the protection of:

- the quality and resilience of the resource;
- the variety and range of species and their contribution to the biodiversity of the city;
- their ecological integrity;
- their ... potential [for] harvest for cultural purposes.



82

Section 6 of the Waitakere District Plan [Volume : Policy].

83

Theme 3, Section 6 of the Waitakere District Plan [Volume : Policy p. 12].

84

Issue 5.2 in section 5 of the Waitakere District Plan [Volume : Policy p. 37].

85

Waitakere District Plan Policy Volume p. 38.

The explanation of the Objective adds that it “must be considered alongside objectives relating to water quality, landscape, amenity values and heritage, for a full understanding of the ... Plan’s approach to protection of native vegetation”.

[71] In order to implement methods of achieving the objectives of the district plan, the district is covered by two overlapping sets of management maps : one for the ‘Natural Environment’ and one for the ‘Human Environment’. Those correspond very loosely to natural and physical resources respectively, although there are overlaps and confusions. The important point is that any one piece of land is always covered by two maps and by two corresponding sets of rules.

Managed Natural Areas

[72] Turning first to the Natural Areas maps, a large area of Waitakere district is covered by the “Managed Natural Area”⁸⁶ which includes areas of significant and outstanding native vegetation⁸⁷. The reasons for attributing significance to these areas include⁸⁸:

- because there has been a major loss of [native] bush in the urban area what does remain, is rare;
- the areas have particular ... significance for an urban population which is generally separated from the native bush areas;
- the potential of these areas for regeneration ...;
- the importance of these areas as part of the ecological corridors through the City ...

Much of this is located in the Waitakere Ranges but including part of the suburbs of Titirangi and Laingholm. That is important for these proceedings because those suburbs contain many properties falling within the Simplifying Act’s definition of “urban environment”. The Natural Areas rules affect the human environment because Waitakere district map H9 covers part of Titirangi and Laingholm. Many of the smaller lots adjacent to the coast and roads fit within the definition of the “urban environment”⁸⁹. They are shown as zoned “Bush Living” on the adjacent Human Environment map (which we have not copied).

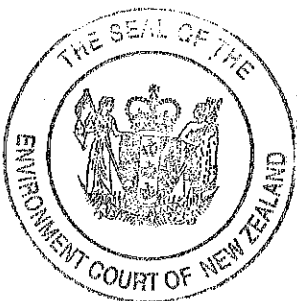
[73] The vegetation protection rules in the Waitakere plan provide threshold and performance standards in relation to the vegetation clearance in any Managed

⁸⁶ The full set of categories is colour coded on the maps. The parts of Titirangi and Laingholme with which we are concerned here are coloured light green denoting “Managed”.

⁸⁷ See Map 3.5(A) Waitakere District Plan p. 9.

⁸⁸ Waitakere District Plan p. 10.

⁸⁹ Within the meaning of section 76(4B) of the RMA as applied to the Simplifying Act by section 152(5) of the latter.



Natural Area. We will not length this decision by quoting the whole of rule 2 but will quote part of it as an example:

**RULE 2⁹⁰ VEGETATION ALTERATION
RULES**

2.0 General

The following rules shall apply only to those activities involving *vegetation alteration*⁹¹ (*pruning, clearance* and any work within the *dripline* of *vegetation*).

2.1 Permitted Activities

Activities meeting the following Performance Standards are *Permitted Activities*:

- (a) the *pruning* of *native vegetation* if done in accordance with accepted modern arboricultural practice, and no more than 20% of the foliage of a plant is removed in one calendar year.
- (b) any *vegetation alteration* of:
 - (i) *exotic vegetation*, and
 - (ii) ...

2.4 Discretionary Activities

Activities meeting the following Performance Standard are *Discretionary Activities*:

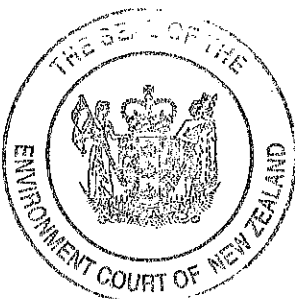
- (a) *clearance* of *native vegetation* not meeting the standards in Rules 2.1, 2.2 and 2.3 provided that the *clearance* is for the establishment of a *building platform, driveway* or *infrastructure* and provided further that *clearance* on any *site* or *proposed site* does not increase the *total cleared area* of the *net site area* to more than 500 m².
- (b) *vegetation alter[...]*ation associated with a *subdivision* requiring a *resource consent* pursuant to Subdivision Rule 4 (Greenfields Subdivision) not meeting the standards in Rule 2.3(b).
- (c) *Discretionary Activity* Applications will be assessed having regard to Assessment Criteria ... and any other matters which are relevant under section 104 of the *Act*.

2.5 Non-Complying Activities

Any Activity to which these rules apply which is not a *Permitted Activity*, a *Limited Discretionary Activity* or a *Discretionary Activity* under the above rules shall be deemed to contravene a rule in this *Plan* and shall be a *Non-Complying Activity*.

In an affidavit for the Auckland Council, Mr P M Brown, a planner for the former Waitakere City Council, explained Managed Natural Area rule 2 as follows⁹²:

[It] permits pruning of native vegetation and removal of exotic vegetation. Clearance of native vegetation (of any height) is a limited discretionary activity provided that the clearance is for the establishment of a building platform and the total cleared area on the site



⁹⁰ Waitakere District Plan, Rules Volume 1 : Managed Natural Area p. 4 *et ff.*
⁹¹ Words in *italics* are defined – see the Definitions part of the *City-Wide Rules*. Waitakere District Plan Rules, Volume 1 : Definitions p. 7.
⁹² P M Brown, affidavit 10 September 2010 para 36.

does not exceed 300 m². Clearance up to 500 m² is a discretionary activity and clearance beyond that threshold is assessed as a non-complying activity.

In summary, the Managed Natural Areas allow clearance and trimming (pruning) of any exotic vegetation but provide a complex series of rules for vegetation alteration of native vegetation. The question in these proceedings is whether the rules meet the exceptions in section 152 of the Simplifying Act.

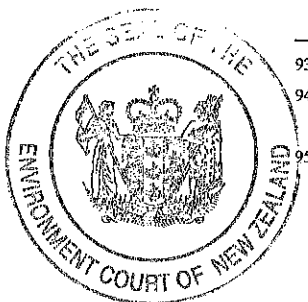
[74] For the Auckland Council Ms Ash argued that Managed Natural Area Rule 2 qualifies as a rule relating to "... group(s) of trees ... specifically identified ..." in the Waitakere plan because each area of "Managed Natural Area" is shown on the relevant Managed Natural Area map and because⁹³ "... the vegetation ... constitutes a group of trees by virtue of comprising largely continuous and contiguous trees and also as a result of those trees forming part of an indigenous forest ecosystem".

[75] More precisely, the question for us is, does the Natural Environment rule 2 when read with map H9 in the light of Objective 2 and its sundry policies "specifically identify a group of trees" for the purpose of section 152(3) of the Simplifying Act? We consider it does : native trees are included in the defined term "native vegetation" and the area described as "Managed Natural Area" can be seen on map H9 as a whole and in relation to each allotment. The rationale for Managed Natural Areas is given in the policy volume of the district plan and the complex rule 2 is justified by and intended to implement the detailed policies following Objective 2.

Riparian Margins/Coastal Edges Natural Area Rule 2 Vegetation Alteration

[76] The width of the Riparian Margins/Coastal Edges Natural Area varies between five metres and 20 metres on either side of a stream, or on the edge of a wetland or lake, or adjacent to the coast depending on the characteristics of the stream or water body or coast. The general location and precise width of the Riparian Margins/Coastal Edges are shown in colour on the Natural Area maps.

[77] The vegetation alteration rule has the same complex structure as the equivalent Managed Natural Areas rule already quoted (in part) in this decision. We will not lengthen this already long decision by quoting the Riparian Margins etc rule here. It suffices to adopt Mr Brown's explanation of the rule⁹⁴ as follows⁹⁵:



⁹³

Auckland Council submissions para 6.59.

⁹⁴

Waitakere District Plan Riparian Margins/Coastal Edges Natural Area Rule 2 Vegetation Alteration p. 4 .

⁹⁵

P M Brown, affidavit 10 September 2010 para 38.

[It] permits removal of exotic vegetation under 6 metres in height provided that the clearance does not exceed 10% of the Riparian Margins/Coastal Areas Natural Area on a particular site. Clearance of native vegetation of any height is generally a non-complying activity unless the clearance is required for the establishment of infrastructure or for access purposes.

Mr Brown considered that while the vegetation cover is not continuous, it constitutes a group of trees that can be classed together by association and function as an ecological unit, with the common thread including the trees' shared riparian location and tolerance to riparian conditions.

[78] We find that the trees are part of an ecosystem described in the text of the rules and the area in which they are located is clearly defined in the district plan maps that show the extent of the Riparian Margins/Coastal Edges Natural Area in relation to individual properties.

The Upper Hutt Plan

[79] We consider it inappropriate to comment on the Upper Hutt District Plan since it was not the subject of these proceedings. However, we hope the Upper Hutt City Council benefits a little from our determination of the legal issues about section 152(3) of the Simplifying Act.

How should we exercise the court's declaratory powers?

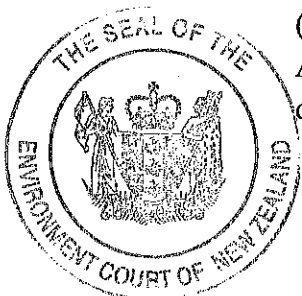
Our powers under section 313

[80] Under section 313 of the RMA we may make the declaration sought, decline it, or make any other declaration we consider necessary or desirable.

[81] No party suggested that if we find the rules discussed within the Auckland Council's powers, we should, despite that, refuse to make declarations. The two most important factors in favour of declarations are first that we find most of the rules are clearly legal. Secondly, the effect of declarations may well be to save the Auckland Council reasonably large sums of money in that it will not need to notify new tree protection rules to replace those we have been asked to make declarations about.

[82] We consider that the declarations sought can and should, with one exception, be made with minor grammatical changes.

[83] The exception in respect of Declaration 1 relates to the proposed rules in the Long Bay Zones. Since those rules are still in the hands of the Environment Court (differently composed) we consider that this decision should be referred by the Auckland Council to the parties in that proceeding so they can resolve any perceived difficulties in the proposed rules, or refer them to the adjudicating court.



Accordingly, we decline to make any declaration on the proposed rule(s) for Long Bay in these proceedings.

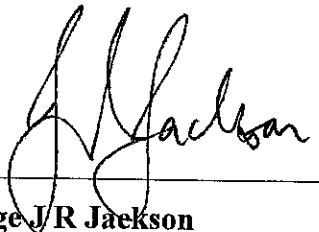
Afterword

[84] We thank all counsel for their helpful submissions.

[85] Two other matters may be worth mentioning. First, the effects of the new section 76(4A) added by the Simplifying Act will be that in order to achieve the ecological service and amenity benefits (and incidentally, financial benefits for most landowners) given by trees local authorities may in the future need to consider more carefully the benefits, for protecting trees and the benefits they produce, of imposing covenants or other conditions upon subdivision and/or development, and register covenants or consent notices on new titles when potential new “urban environments” are being created.

[86] Secondly, the answer to the question at the beginning of the reasons for this decision – ‘Are people free to cut down trees in their gardens?’ – is ‘it depends’. Each rule that purports to manage trimming or felling of trees needs to be looked at in its own context as well as in the light of the statutory purpose. People need to realise that retention of trees under district plans may be much more than a simple aesthetic issue.

For the Court:



Judge J.R. Jackson
Environment Judge



SCHEDULE*North Shore District Plan*

- (a) Rule 8.4.6.2 as it relates to Notable Groves of Trees depicted in the North Shore City District Plan Maps and listed and described in Appendix 8C: Schedule of Notable Trees of the North Shore City District Plan.
- (b) Rule 8.4.6.1.3(a)(i) applying to any pohutukawa tree of 3 metres or more in height located within the Coastal Conservation Area or in the area of Lake Pupuke Site of Geological Significance 3 shown on the North Shore City District Plan Maps.
- (c) Rule 8.4.6.1.3(a)(ii) applying to any native vegetation within the foreshore yard and any vegetation (excluding invasive weed species) within the 30 metre lakeside yard shown on the North Shore City District Plan Maps.
- (d) Rule 8.4.6.1.2 (e) applying to any native vegetation (including the roots) when it is part of a continuous, naturally occurring area of native vegetation in the Residential 2A, 2A1 and 2B Zones in the North Shore City District Plan.
- (e) Rule 8.4.6.1.2 (b) applying to any native tree of 6 metres or more in height or 600mm or more in girth (measured at 1.4 metres above the ground) or any exotic tree of 8 metres or more in height or 800mm in girth (measured at 1.4 metres above the ground) in the Residential 2B Zone in the North Shore City District Plan.

Waitakere City District Plan

- (g) Managed Natural Area Rule 2 (Vegetation Alteration) of the Natural Areas Rules as it relates to land within the Bush Living Environment in the urban environment shown on the Waitakere City District Plan Maps.
- (h) Riparian Margins/Coastal Edges Natural Area Rule 2 Vegetation Alteration of the Natural Areas Rules as it relates to land in the urban environment within the Riparian Margins/Coastal Edges Natural Area shown on the Waitakere City District Plan Maps.

