GWENAELE RASHBROOKE

JUDICIAL SCRUTINY OF THE RESOURCE: CONSENT PROCESS

REVIEW VS APPEAL

LLB(HONS) RESEARCH PAPER

JUDICIAL REVIEW IN THE COMMERCIAL ARENA
(LAWS 501)

LAW FACULTY

VICTORIA UNIVERSITY OF WELLINGTON

1996

CONTENTS

ABSTRACT

The use of land and natural resources is governed in New Zealand by the Resource Management Act 1991. The Act provides that before certain activities are undertaken, a resource consent must be obtained from the local authority. The decision of the consent authority is clearly of considerable importance to any person or business wishing to undertake development activities. It is thus vital that the discretion conferred on the authority be exercised in accordance with clearly established principles. Judicial scrutiny provides a means of ensuring that these powers are correctly exercised. In recognition of these principles, the RMA makes provision for appeal against the decisions of consent authorities. However it does not make clear the role envisaged for judicial review.

This paper considers the role of judicial review in the resource consent process. The aim of the paper is to identify the scope of review in relation to consent decisions, and to contrast its role with that of the appeal process provided for by the Act. The paper looks at the nature of the decision exercised by the consent authority, and notes the uncertainty and complexity of the evidence it must consider. The paper then looks to the different ways in which the decision can be challenged through the courts, and analyses the respective roles of appeal and review in the consent process. It concludes that judicial review is not ideally suited to scrutiny of the initial consent decision and that this function is better performed by the Planning Tribunal which has the necessary expertise. However despite the existence of a further right of appeal to the High Court, it is argued that there may be a role for judicial review of the Planning Tribunal decision.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, and annexures) comprises approximately 17,804 words.

As might be expected in a property-owning democracy, governmental controls over the use and development of land have provoked some of the most intense disputes about the proper exercise of official power.

De Smith, para 22-001.

I INTRODUCTION

The Resource Management Act 1991 ("the RMA" or "the Act") was introduced as a radical reform and consolidation of natural resource and planning law in New Zealand. It establishes a new framework for the regulation of a wide range of activities involving the use of natural resources. As well as its effects on the individual and its implications for the environment, the Act has an important impact on commercial development. Of particular importance is the requirement that a resource consent be obtained from the local authority before certain activities are undertaken. In exercising its discretion, the local authority must consider a wide range of criteria, and assess whether the proposed activity is consistent with the purpose and principles of the Act. It is a decision which may require the consideration of complex scientific evidence as well as the interpretation of the purpose and principles of the Act.

The considerable impact of the decision means that it is vital that it be exercised according to clearly established principles. Professor Geoffrey Walker notes that the courts have an important role in this respect, stating that "there must be effective procedures and institutions such as the judicial review of executive action to ensure that government action is also in accordance with law."[1] This function is traditionally exercised by the courts upon an application for judicial review. In New Zealand judicial review is available under the High Court rules and under the Judicature Amendment Act 1972 ("the JAA"). However the drafters of the RMA clearly envisaged that judicial scrutiny of decision making under the Act would take place by way of appeal. In fact it appears that the role of judicial review was not much considered during the resource management reforms, and the scope for its use under the Act remains unclear. The purpose of this paper is to assess the potential for judicial review of the consent process, and to contrast its role with that of appeal.

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1 Geoffrey De Q Walker *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988), 29.

Part II of this paper locates the decisions of consent authorities within the structure of the Act, and outlines the nature of environmental decision making. The different means of challenging these decisions are examined in Part III. The different levels of appeal are outlined and discussed, and the role of review is explored. In Part IV the different procedures are compared and evaluated. Part V concludes the paper.

Although the Resource Management Amendment Bill (No 4) has recently changed the name of the Planning Tribunal to the "Environment Court", for the purposes of this paper it will continue to be referred to as the Planning Tribunal.

II NATURE OF THE DECISIONS BEING CHALLENGED

A Powers and Functions Conferred by the Act

The RMA confers a wide variety of decision making powers on a number of different bodies. While it is proposed in this paper to focus on decisions made by local authorities in the resource consent process, it is useful to first locate these decisions within the framework of the Act. Thus for example, the Minister for the Environment is assigned the role of monitoring the overall effect and implementation of the Act, making regulations to establish national environmental standards, calling-in a resource consent application which concern a matter of national significance, as well as approving a body to act as a heritage protection authority or a network utility requiring authority.[2] Under Part IV of the Act the Minister is given certain "residual" powers in order that these functions be carried out.[3] The key function of the Minister of Conservation is in the preparation of national coastal policy statements, and the approval of regional coastal plans and permits.[4] The Minister of Conservation also has the continuing functions of monitoring the effect of the statements and coastal permits issued.[5]

However, it is the regional councils and territorial authorities, known collectively as local authorities, who are allocated the primary decision making responsibilities under the Act. These responsibilities include both policy formulation and policy implementation functions. Thus regional body functions include establishing and

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2 Kenneth Palmer *Local government law in New Zealand* (Law Book Company, Sydney, 1993), 584.

3 RMA s 25.

4 RMA s 28.

5 Above n 2, 585.

implementing objectives, policies and methods to achieve integrated management of the natural and physical resources of the region. These rules and policies then become the regional plan. Regional councils also have control over soil conservation, water use and water quality maintenance, hazardous substances, and discharges of contaminants into water or air. Territorial authorities has the function of establishing policies and plans concerning land use, storage of hazardous substances, control of subdivision of land, control of emission of noise and control of activities on the surface of water in rivers and lakes. These policies and plans in turn form the basis of the district plan.

As part of their implementation function outlined above, regional bodies and territorial authorities hear applications for "resource consents". Any activity which is not a "permitted activity" under the relevant regional or district plan will require the authorisation of the local authority in the form of a resource consent. The five different types of resource consent provided for by the Act are a land use consent, a subdivision consent, a coastal permit, a water permit and a discharge permit. The district or regional plan may also classify a certain activity as a permitted activity, a discretionary activity, a non-complying activity or a prohibited activity. An application for a resource consent cannot be made in respect of a prohibited activity and need not be made in respect of a permitted activity. However an application for a certificate of compliance may be made for any permitted activity.

An application for a resource consent must be made in the prescribed form. It should include a description of the proposed activity and its location, as well as an assessment of the actual and potential effects on the environment and ways in which those effects might be mitigated. Unless the application meets the criteria for non-notification, the consent authority must then notify specified persons including every person who is known to be an owner or occupier of land to which the application relates. Notice must also be served on other local authorities and local iwi authorities where the authority thinks it is appropriate. Where an application has been publicly notified, any person can make a submission in writing to the consent authority. A hearing is required only if the consent authority believes it is necessary or if a submitter has expressed the desire to be heard in respect of the application. In making a decision on the application, the consent authority should have regard to any effects on the environment of allowing the activity, any relevant regulations, policy statement, or plan, and any other matters considered relevant. The decision must be made subject to Part II of the Act which contains its purpose and principles. However it should be noted that while the Act specifies some consideration to which the local body must have regard, it provides few substantive rules. Subject to the provisions of the Act, the consent authority may also impose a number of conditions on the grant of the consent.

B Nature of Environmental Decision Making

Decisions made under the RMA are complicated by the fact that they deal not only with the rights and obligations of parties directly affected, but also with the wider environmental impact of the decision. Environmental disputes have been described as essentially "public" disputes because they involve not only the rights of individuals to undertake certain activities, but also questions of community values concerning the appropriate balance between economic development and environmental preservation. This potential conflict of objectives is encapsulated in s 5 of the RMA which contains the sole purpose of the Act of "sustainable management of natural and physical resources".[6] The definition of "sustainable management" makes reference to providing for the social, economic and cultural wellbeing of communities while safeguarding ecosystems and avoiding or mitigating any adverse effects on the environment.[7] It is still unclear what degree of priority is conferred on ecological concerns by the section, and to what extent these must be balanced against competing social, economic or cultural considerations.[8] However it is argued that the public nature of these decisions heightens the need for decision makers to be accountable to the public, and for the public to be able to enforce that responsibility through the courts.[9]

Another characteristic of environmental decision making is that it involves consideration of complex scientific evidence. That evidence is often uncertain, and there are few objective standards against which to measure the effect of any activity on the environment.[10] While in scientific terms there may be no answer to the question whether an activity will have an adverse environmental effect, in law there must be such an answer. Even where there are objective standards, there may be disagreement as to interpretation of those standards and the inferences that can be drawn from them. It has been suggested therefore that these decisions are better left to expert agencies, rather

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6 RMA s 5(1).

7 RMA s 5(2).

8 See D Fisher "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives in Brookers Resource Management Act (1991) Vol 1; B Harris "Sustainable Management as an Express Purpose of Environmental Legislation; The New Zealand Attempt" (1993) 8 Otago Law Review 51; B Pardy "Sustainability: An Ecological Definition for the Resource Management Act 1991" (1993) 15 NZULR 351; K Grundy "In search of a logic: s5 of the Resource Management Act 1991" [1995] NZLJ 40.

9 Gary Meyers "Meeting Public Expectations - Judicial Review of Environmental Impact Statements in the United States: Lessons for reform in Western Australia?" (1996) 3 Murdoch University Electronic Journal of Law, para 6.

10 Above n 9, para 4.

than being subject to review by traditional or even specialist courts.[11] However it is also argued that courts deal with complex and uncertain matters all the time and that scientific complexity is a "shibboleth" which should not serve to prevent scrutiny of official decision making.[12]

11 Above n 9, para 5.
12 Above n 9, para 11.

III WAYS IN WHICH DECISIONS CAN BE CHALLENGED

A Appeal to the Planning Tribunal

1 Nature of the review conducted by the Tribunal

As noted above, the primary mechanism for challenge to decisions of consent authorities is though appeal to the Planning Tribunal. The decision to provide for an initial appeal to a specialist tribunal accords with the finding of the Legislation Advisory Committee that such bodies may be better suited to the role of implementing and developing the policy established by Parliament than would be the ordinary courts.[13] However, despite its name, the Tribunal has always been a Court of Record and is required to act in a judicial manner. Thus its recent change of name to "Environment Court" perhaps more accurately reflects its status. Nevertheless, the Tribunal does possess some of the qualities of an ordinary tribunal[14] in that formalities are kept to a minimum[15] and parties do not have to be represented by lawyers thereby allowing for wide public participation.[16] Perhaps most importantly, the Tribunal is a specialist body which hears only resource management appeals and is staffed by specialist Planning Judges[17] who are District Court Judges with a background in environmental and resource management law. It is interesting also to note that the Legislation Advisory Committee must have considered the Tribunal to have the functions of an ordinary tribunal by including it in its report on administrative tribunals.[18] For the purposes of this paper, therefore, the Tribunal will be treated as possessing the characteristics of a tribunal, while keeping in mind that it does exercise the powers of a court.

A right of appeal to the Planning Tribunal is conferred by s 120 on the applicant for the resource consent and any person who has made a submission in respect of the application. On appeal, the Planning Tribunal hears the application de novo,[19] and may confirm, amend or cancel a decision to which the appeal relates.[20] It should be noted that the Tribunal does not assess whether the decision of the consent authority was

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13 Legislation Advisory Committee *Administrative Tribunals - Report No 3* (Wellington, 1989), para 42.

14 The Franks Committee listed some of those qualities as "cheapness, accessibility, freedom from technicality, expedition and expert knowledge". *Report of the Committee on Administrative Tribunals and Enquiries* (1957) Cmnd 218. ("the Franks Committee Report"), 9.

15 David Sheppard "The why, who and how of resource management appeals" (1996) 1 Butterworths Resource Management Bulletin 195, 196.

16 Although note discussion of standing requirements below Part III A2.

17 Subsequent to the 1996 Amendment Act they are now known as Environment Judges.

18 Above n 13.

19 RMA s 290(1).

20 RMA s 290(2).

correct, but gives its own decision in place of that of the consent authority.[21] This process encourages greater openness and impartiality in council decision making. However the focus of the appeal procedure is not on the decision making process itself, but rather on whether the correct decision was reached on the facts of the case at hand.

It is interesting also to note the different types of dispute the Tribunal is required to adjudicate, and the different parties which may be involved. At one level the Tribunal is required to exercise an essential function of administrative tribunals in striking the balance between private right and public interest.[22] Sheppard notes that one of the primary aims of establishing an appeal system was to "ensure that there is justice as between the people and the authority, to hold the scales of justice...and to preserve the rights of the individual".[23] However, the Tribunal hears a large number of disputes between one individual and another. In such cases there is also usually a broader public interest in the quality of the environment which transcends the private interest of the individual disputants.[24] While parties may not present these arguments, the Tribunal is required by the Act to consider them in deciding whether or not a consent should be granted. The appeal process is also seen to protect the rights and interests of minority sections of the community in that there is a perceived need to counterbalance the fact that the local authority is an elected body and therefore reliant on majority support.[25]

Thus it can be seen that the Planning Tribunal adjudicates in a number of different types of dispute. In each of these cases the Tribunal exercises the important function of ensuring that the rules established by the Act are applied equally as between disputing parties. The fact that the Tribunal hears the appeal de novo gives it a wide power of review. However the breadth and effectiveness of that power will be affected by limits on who can participate in the process and the quality of evidence which is put before it.

2 Standing

As noted in the preceding section, one of the aims of appeal to the Planning Tribunal is to allow for wide public participation. This ensures that informed decisions are made, and that public confidence in the system is retained. Unfortunately, however, these objectives have been undermined by the development of highly restrictive standing

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21 Above n 15, 196. See discussion below Part III D1(a)(ii) as to whether the jurisdiction of the Planning Tribunal is appellate or original.

22 Above n 13, 15.

23 Above n 15, 194.

24 Above n 13, 21; Above n 34, 195.

25 Above n 15, 195.

rules. As the following analysis will show, such a development is both unnecessary, and contrary to modern developments in relation to rules on standing.

Standing to appear before the Tribunal is determined by s 274 of the Act. That provision grants standing to the Minister for the Environment, any local authority, any person having any interest in the proceedings greater than the public generally, and any party to the proceedings. As s 120 confers appeal rights on any person who has made a submission at the consent hearing, any such objector will have standing under s 274 by virtue of being a party to proceedings. However the position becomes more complicated where a person who failed to exercise their right to make a submission at the consent hearing stage wishes to appear when the case is appealed. This situation might arise, for example, where the significance of the matter does not become apparent until the appeal stage. Similarly, a person may wish to appear at an appeal hearing where there has been no right to make submissions. In order to obtain standing in these circumstances, that person will have to bring themselves within the "interest in the proceedings greater than the public generally" limb. Past practice would have suggested that this should be a straightforward exercise.[26] However as it will be seen, the Planning Tribunal has taken a highly restrictive interpretation to this phrase in recent cases.

(a) Tribunal decisions on standing

The first case which indicated a narrowing of standing requirements was *Purification Technologies Ltd v Taupo District Council*.[27] That case involved an appeal by the applicant against a decision to refuse it a certificate of compliance for a proposed commercial gamma radiation plant. There is no opportunity to make submissions in relation to an application for a certificate of compliance, thus the only parties to the proceedings were the applicant and the Council. However a number of interested groups wished to appear at the hearing. They claimed that they had standing on the basis they had an interest in proceedings greater than the public generally. The Tribunal found that over half those wishing to appear, including Greenpeace New Zealand Inc, Friends of the Earth, a group named Reject Irradiation Plant, and four local residents had insufficient interest in the proceedings.

In reaching this conclusion the Tribunal stated that the standing provisions in the RMA were different from those of the Town and Country Planning Act 1977 ("the TCPA").

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26 See for example *Body Corporate 97010 v Auckland City Council* (1993) 2 NZRMA 257 in which the Civic Trust Auckland Inc were granted standing to support local residents under the former equivalent s 157 of the Town and Country Planning Act 1977.

27 [1995] NZRMA 197.

Sheppard J noted that although the wording of s 157 of the TCPA was substantively the same as s 174 of the RMA, there was no equivalent to s 2(3) of the TCPA which made special provision for representation by public interest groups. He also noted that the RMA made wider provision for non-notification of resource consents than the earlier legislation. In the absence of any New Zealand case law on the interpretation of the phrase "an interest greater than the public generally" the Judge looked at a number of Australian and Canadian cases concerning similar statutory provisions. He placed particular reliance on the decision of the Australian High Court in *Australian Conservation Foundation v The Commonwealth of Australia*.[28] In that case it was held that a person did not have a sufficient interest to be granted standing on an application for judicial review where the interest was a mere intellectual or emotional concern. The Court stated that it was necessary for a person to be "likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning consent".[29] Applying this reasoning in the case before him, Sheppard J stated that where there was no right of intervention for third parties at the initial hearing, the interest in proceedings must be "one of some advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote."[30] He emphasised the point that an interest in seeking to enforce the public law as a matter of principle would not be sufficient.[31]

This decision has been followed in subsequent cases, and the reasoning extended to appeals lodged against resource consent applications under s 120. In *Paihia & District Citizens Association v The Northland Regional Council*,[32] the Tribunal considered whether a Maori woman who had not made a submission at the consent hearing had standing to appear on behalf of herself and her whanau. The Tribunal found that she did not have an interest greater than the public generally, despite the fact she had established that her whanau were recognised as being tangata whenua of Paihia for many generations.[33] The Tribunal referred to *Purification Technologies*, stressing that it was not its desire to exclude people who wished to appear, but that it was bound by what Parliament had provided in the Act.[34]

A similar question arose in *Te Runanga O Te Taumarere; Chellwood Oysters & Co; N Harrington & Others v The Northland Regional Council*[35] which concerned a sewage

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28 (1980) 28 ALR 257.
29 Above n 28, 270.
30 Above n 27, 204.
31 Above n 27, 204.
32 A71/95.
33 Above n 32, 2.
34 Above n 32, 2.
35 A81/95.

treatment proposal. In that case the Tribunal found that a local kaumatua did have standing because his interest in the local pipi beds as a traditional source of food was greater than that of the public generally.[36] However it was held that the Te Ika a Maui Federation of Maori Aquaculturists Commercial and Traditional Fisherman Incorporated did not have standing. The Tribunal again made reference to the absence of an equivalent provision to s2(3) of the TCPA under the present legislation, and stated that "instances where the Tribunal might have been more liberal under past legislation where a request to join proceedings was not opposed, cannot alter that meaning, nor can decisions by the High Court to give standing to applicants for judicial review, to which section 274 does not apply".[37] The Tribunal did state, however, that *Purification Technologies* should not be taken as limiting standing to where an applicant was able to show the infringement of a property right.[38]

Nevertheless, standing was again denied to public interest groups in *Northland Port Corporation (NZ) Ltd v Whangarei District Council.*[39] That case concerned an application for a declaration under s313 of the RMA relating to proposals for reclamation and associated works at Marsden Point. Applying the test from *Purification Technologies*, the Tribunal found that the Stop CRA Pollution Group did not have a sufficient interest to participate in the declaration hearing. Nor did the Tribunal accord standing to the Forest and Bird Protection Society or the Whangarei Heads Citizens Association Incorporated. The Tribunal did suggest that an individual member of the latter association might have a sufficient interest as an owner of nearby property.[40] The Tribunal stated again that it was not its wish that anyone who sought to participate should be declined the opportunity to make submissions.

(b) Analysis of decisions

This line of cases has been vigorously criticised by a number of commentators who argue that this interpretation of s 274 runs contrary to the aims of the legislative reform which were to increase public participation.[41] As the High Court noted in *Ports of Auckland v Auckland Regional Council*,[42] "the whole thrust of the Act favours interested parties to have an input into the decision making process".[43] The focus on

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36 Above n 35, 5.
37 Above n 35, 4.
38 Above n 35, 4.
39 A117/95.
40 Above n 39, 3.
41 See for example, Kenneth Palmer "Standing before the Planning Tribunal" (1995) 1 Butterworths Resource Management Bulletin 143; Andrew Riddell "Standing problems continue under RMA" (1996) 1 Environmental Law Reporter 167.
42 [1995] NZRMA 233.
43 Above n 42, 239.

private property rights also has serious implications for Maori groups who traditionally operate on a communal interest basis. This problem can be seen in the *Paihia & District Citizens* case, although the Tribunal appears to have adopted a slightly broader approach in the *Te Runanga O Taumarere* case.

An examination the reasoning of the Tribunal in *Purification Technologies* and subsequent cases suggests that an unnecessarily narrow interpretation has been adopted. First, it is difficult to understand the reliance of the Tribunal on the absence in the RMA of a provision equivalent to s 2(3) of the TCPA. That provision related to objection rights at the initial hearing stage, and not directly to standing rights at an appeal hearing. While it is true that there is no equivalent provision aimed specifically at public interest groups, the RMA confers the right to make a submission on a notified resource consent application on "any person".[44] Thus the legislators would have seen no need to single out public interest groups.

There may be more weight in the Tribunal's observation that where no right of intervention is accorded to third parties at the initial hearing it should be more hesitant to grant standing to persons or groups who are not parties. However it is a little curious that the Tribunal should seek to apply the same reasoning to appeals against *notified* resource applications under s 120. In the *Te Runanga O Taumarere* case, the Tribunal is surely incorrect in stating that "if Parliament had wished representative bodies to be entitled to take part in Tribunal proceedings it would have provided for them in language similar to that used in the 1977 Act."[45] In fact, the RMA confers equally comprehensive objection rights, and makes identical provision for standing in s 274. It might be assumed that in following the previous provision identically, Parliament intended that the same standing rules apply.[46] The issue here is what the position ought to be where someone has not availed themselves of their objection rights at the initial hearing. In this respect the situation is no different to that which existed under the previous legislation.

Secondly, the Tribunal takes an extremely conservative view on the authorities relating to standing. The decisions referred to are mostly judicial review cases, and it is arguable that they are not relevant to the much more informal procedure of the Planning Tribunal. Kenneth Palmer notes that an appeal to the Planning Tribunal is not a strict legal action and cites the case of *Wellington Club Inc v Carson* that the process is "looking to solutions based upon inquiry rather than to decisions in favour of

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44 RMA, s 96.
45 Above n 35, 5.
46 Palmer, above n 41, 144.

successful contestants".[47] Furthermore, as discussed in Part III D below, even in judicial review cases standing rules have been significantly relaxed since the case on which the Tribunal relied, *Conservation Foundation,* was decided. Recent Australian decisions on standing have also exhibited a more generous approach.[48] It is interesting to contrast the Tribunal's reliance on judicial review cases in *Purification Technologies* with its statements in the later *Te Runanga o Taumarere* case that judicial review decisions cannot provide authority for wider standing requirements. It does not seem logical that judicial review cases be relied upon to restrict standing but not to broaden it. In fact, on the basis of Palmer's analysis, it might be possible to argue the converse, that there should not be a stricter standing requirement in the Tribunal than there is on review.

Thirdly, s 5 of the RMA states that communities should be able to provide for their social, economic, and cultural wellbeing, and it has been suggested that this provision recognises that community interest groups have an interest greater than the public generally.[49] Palmer argues further that the approach of the Planning Tribunal is inconsistent with s 27(1) of the New Zealand Bill of Rights Act 1990.[50] That section provides that "every person has the right to the observance of the principles of natural justice by any Tribunal...which has the power to make a determination in respect of that person's...interests protected or recognised by law". Palmer states that the interest of a bone fide environmental group in appearing on an appeal under the RMA must be an interest recognised by law and that this group would therefore have a right to be heard under s 27(1). He thus proposes that by virtue of s 6 of the Bill of Rights Act, the ambiguity in s 274 should be construed so as to provide a wide standing requirement, thereby giving effect to the right of an environmental group to appear before the Tribunal. However the difficulty in his argument lies in identifying the interests of an environmental group as being a "person's...interests protected or recognised by law".

The Acts Interpretation Act 1924 defines "person" to include an unincorporated body of persons which would bring an environmental group within s27(1). However s29 of the Bill of Rights Act states that except as otherwise provided, the provisions of the Act will apply "for the benefit of all legal persons as well as for the benefit of all natural persons". An incorporated environmental group would come within the definition of a legal person and therefore needs to identify the interest of that legal person. An unincorporated group on the other hand is a collection of natural persons, each of

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47 [1972] NZLR 698, 702.

48 See discussion in Meyers, above n 9, para 6.

49 "Te Runanga o Taumarere v Northland Regional Council" *Brooker's Resource Management Gazette*, Wellington, New Zealand, 15 September 1995, 1.

50 Palmer, above n 41, 146.

whom may have an interest. In either case, the key question is whether the interest is one protected or recognised by law. As noted above, it can be argued that s 5 of the RMA recognises the particular interest of the community in protecting the environment. Thus a community environmental group might be able to show an interest recognised by law and thereby bring itself within s 27(1). However there is nothing in the statute which would recognise the interest of an environmental group which was not community based. It appears, therefore, that Palmer's argument might be successful, but only in respect of community environmental groups.

(c) Recent developments in the law

It should be noted that Parliament has responded to the difficulties raised in the *Purification Technologies* line of cases. Clause 46 of the recently enacted Resource Management Amendment Act (No 4) modifies s 274 of the RMA to extend standing to "any person representing some relevant aspect of the public interest". Two points can be noted in respect of this amendment. First, while the amendment will eliminate a substantial number of the problems presently being experienced in relation to s 274, it does not address the key problem of the Tribunal taking an unnecessarily restrictive approach to standing. The preceding analysis suggests that the real problem with earlier decisions on standing lay not with the legislation itself but with the restrictive approach given to it by the Tribunal.

Secondly, it is interesting to note that the amendment has sparked some revival of the debate as to whether any formal requirement is necessary at all. During the reform process, commentators such as Palmer advocated the abolition of standing requirements.[51] Andrew Riddell has reopened the debate, arguing that the amendment does not go far enough to extend standing. He suggests that formal standing requirements may be unnecessary in the light of the Tribunal's powers to impose costs awards under s 285, to limit addresses by parties having the same interests under s 267(1)(h), and generally to regulate its own proceedings under s 269.[52] While Parliament has again chosen not to follow this approach, it is to be hoped that the Tribunal will take a more generous approach to the provision as amended. In this way, effect would be given to the public participation objectives of the resource management reform and the role it envisaged for the Planning Tribunal as an informal body unconstrained by needless technicalities.

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51 See for example, Palmer in JJ Hassan & KA Palmer *Resource Management Law Reform: Resource Management Disputes: Part A: The Role of the Courts & Tribunals - Working Paper No 22* (Ministry for the Environment, Wellington, 1988), 17.

52 Riddell, above n 41.

B Appeal to the High Court on a point of law

1 Scope of the Appeal

While the Planning Tribunal undoubtedly has the expertise to deal with the bulk of resource management appeals, it cannot be expected to deal on its own with difficult legal issues. The Legislation Advisory Committee noted that appeal from the decision of a tribunal provides further protection of the rights of the individual litigant as well safeguarding the public interest in ensuring that the law is being faithfully and correctly enforced.[53] The Committee stated also that appeal serves another important public purpose in the clarification and development of the law.[54] In a similar vein, the Franks Committee found that appeal from the decision of tribunals was important if decisions were to show a reasonable consistency.[55] In recognition of these principles, the RMA carries through from the TCPA, the right of appeal to the High Court on a point of law. However, as the following discussion of the case law will demonstrate, the Court has shown some reluctance in exercising this role.

The right of appeal is conferred on any party to proceedings in the Planning Tribunal by s 299 of the Act. That section provides that the appeal will be conducted in accordance with the High Court Rules except to the extent that they are inconsistent with ss 300 to 397 of the Act. R701 provides in turn that the Rules apply subject to any specific provision in the Act conferring the right of appeal. In *Environment Defence Society Inc v Mangonui County Council*,[56] the Court found that the former HCRR684 and 693 were not applicable in the light of the specific statutory provisions of the TCPA. However in *Countdown Properties (Northlands Ltd) v Dunedin City Council*[57] the Court stated in respect of ss 300 to 307 that "in our view, it is unfortunate that such detailed matters of procedure are fixed by Statute".[58] They noted that statutes are more difficult to amend than Rules of the Court, that most statutes leave procedural matters to the Rules once the right to appeal is conferred, and that it is desirable that the same rules should apply for similar kinds of appeal.[59] The Court recommended amendment to RMA to reduce the procedural detail in ss 300 to 307.

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53 Above n 13, para 59.
54 Above n 13, para 60.
55 Above n 14, para 104.
56 [1987] 2 NZLR 496.
57 [1994] NZRMA 145.
58 Above n 57, 182.
59 Above n 57, 182.

Appeal on a point of law is of a more limited nature than a general appeal. It focuses on correcting errors of law and on keeping inferior courts and tribunals in touch with the general principles of law, legality and natural justice.[60] Thus in contrast with appeal to the Planning Tribunal as discussed above, the role of the High Court under s 299 is extremely limited. While many disputes under the Act involve disagreement on the facts of the case, the High Court has no general appellate jurisdiction on questions of fact. Kenneth Palmer suggests that the rationale for this system is that the Planning Tribunal "is conceived to act as a expert jury on matters of fact and policy, and questions of reasonableness and the public interest as far as relevant to the planning powers".[61] This position is confirmed by the statement of the Legislation Advisory Committee that review of expert tribunals should be limited to questions of law.[62] There has, however, been some debate as to the scope of appeal under s 299, and as to the distinction between fact and law.

(a) The decision in Countdown Properties

The leading decision on the scope of review under s 299 is the *Countdown Properties* case in which the Court stated that:[63]

> this Court will intervene with decisions of the Tribunal *only* if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not have reasonably come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account
>
> [emphasis added]

This test has been applied in many subsequent cases, and has particularly strong precedent value because it was decided by a Full Court of three Judges. It is not clear whether this passage was intended to be an exclusive definition. However the statement that the Court will intervene only in the specified circumstances would suggest that it was intended to be an exclusive definition, and it has been treated as such in subsequent decisions.

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60 Law Commission *Administrative Law: Judicial Review and Statutory Appeals - Report No 226* (HMSO, London, 1994), para 12.3.

61 Kenneth Palmer *Planning and development law in New Zealand* (2ed, Law Book Company, Sydney, 1984), 192.

62 Above n 13, para 64.

63 Above n 57, 153.

(b) The distinction between law and fact

While the first "ground" of intervention does not require the Court to examine the facts of the case, the remaining three "grounds" may require some examination of the facts. The Court has been anxious to limit the scope of this examination and has emphasised the distinction between questions of law and fact. Thus while it is well established that failure to consider relevant consideration gives rise to a question of law, the Court has found that once evidence is before the Tribunal, the weight to be given to it is within the Tribunal's discretion.[64]

In *Manukau City v Trustees of Mangere Lawn Cemetery*,[65] the Court emphasised that the distinction between law and fact would be blurred if it were to consider whether the Tribunal had reached the correct conclusion on the facts.[66] In *New Zealand Rail Ltd v Marlborough District Council*,[67] the Court stated that it was a question of fact and not law whether the Tribunal was correct in reaching the conclusion that the evidence was not sufficient to justify refusing the application on economic grounds.[68] Similarly in *Moriarty v North Shore City Council*,[69] the Court said that consideration of the weight given to the evidence would lead to the appeal turning into a general appeal and not the type of appeal provided and allowed for by the Act.[70]

The repeated references to this point arise from the fact that appellants frequently invite the Court to consider questions of fact. In *BP Oil New Zealand Ltd v Waitakere City Council*,[71] it was noted that "as is becoming increasingly common in cases of this kind, several of the questions are not questions of law, but matters of fact which the appellant seeks to overturn."[72] This reflects the nature of environmental disputes and the fact that the decision maker often hears competing evidence. The Courts have stated emphatically that preferring the evidence of one planner over that of other planners is a judgment on the facts and does not give rise to a question of law.[73]

There does however remain the possibility of the Court overturning a decision on the basis that there was no evidence, or that the conclusion was one which was not "reasonable" on the evidence. The nature of the test for "reasonableness" is not entirely

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64 *Foodtown Supermarkets Ltd v Auckland City Council* (1984) 10 NZTPA 262.
65 (1991) 15 NZTPA 58.
66 Above n 65, 60.
67 [1994] NZRMA 70.
68 Above n 67, 88.
69 [1994] NZRMA, 433.
70 Above n 69, 437.
71 [1996] NZRMA 67.
72 Above n 71, 68.
73 *Stark v Auckland Regional Council* [1994] NZRMA 337, 345.

clear from the case law. In *Moriarty*, Morris J stated that his task was to assess "whether the Tribunal has acted reasonably".[74] By contrast, in the *Mangere Lawn Cemetery* reference was made to "Wednesbury" unreasonableness in the sense of a decision no Tribunal could reasonably reach.[75]

It is clear, however, that the Court will be reluctant to intervene on the basis of insufficient or no evidence. In the *Countdown* case the Court noted that although it was possible in an appropriate case for the Court to find no evidence to justify a finding of fact, "it should be very loath to do so after the Tribunal's exhaustive hearing".[76] Furthermore, the Court has said that it may not intervene even where it does not find any evidence to support the decision. In an oft-quoted passage from *Environmental Defence Society Inc and Tai Tokerau District Maori Council v Mangonui County Council*,[77] Chilwell J stated that:[78]

> An expert tribunal, such as the Planning Tribunal, ought to be given some latitude to reach findings of fact which fall within the area of its own expertise *even in the absence of evidence to support such findings*; and some latitude in reaching findings of fact made in reliance upon its own expertise in the evaluation of conflicting evidence; and some latitude in reaching conclusions based on its expertise, without relating them or being able to relate them to specific findings of fact...[emphasis added]

The Court went on to say that the quality of the evidence on which it made its decision was also for the Tribunal to decide, [79] but did add the proviso that "care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted."[80]

It is interesting to contrast this position with decisions of the United Kingdom courts under the Town and Country Planning Act 1971(UK). In a number of these cases the courts have overturned decisions on the basis that there was no evidence to warrant a finding of fact. However the courts have also been willing to examine the adequacy of the evidence, and in some cases has quashed a decision on the grounds that no reasonable decision maker could come to such a conclusion on the evidence.[81] A

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74 Above n 69, 437.
75 Above n 65, 60.
76 Above n 57, 175.
77 (1987) 12 NZTPA 349.
78 Above n 77, 353.
79 Above n 77, 366.
80 Above n 77, 353.
81 See Paul Walker "Irrationality and Proportionality" in M Supperstone and J Goudie (eds) *Judicial Review* (Butterworths, London, 1992).

distinction can be drawn between the New Zealand and United Kingdom positions by reference to the fact that in the United Kingdom the appeal under s 246 is generally against the decision of a planning inspector. Under the RMA, by contrast, the right to appeal lies against the decision of a judicial body. However it should be noted that in deferring to the decisions of the Planning Tribunal, the High Court of New Zealand has made reference not to the judicial nature of proceedings but to the expertise of the Tribunal. Thus the distinction outlined does not fully explain the cautiousness of the New Zealand Court.

By contrast with the UK planning legislation, the RMA specifies in ss 104 and 105 the considerations which the consent authority must take into account. The question as to whether the precedent effect of a decision is a material consideration provides a useful illustration of this point. In the UK the courts have had to develop their own approach to the merits of consistency over individual justice.[82] In New Zealand, s 104 of the RMA requires the decision maker to have regard to any district or regional plan. The High Court has been able to point to this provision in finding that precedent effect on the integrity of the plan is a material consideration.[83]

(c) Application of a wrong legal test

The first "ground" of intervention enunciated in the *Countdown* case requires the Court to assess whether the Tribunal has applied the correct legal test. This would appear to be the type of issue that the Court was ideally suited to resolving. However on this ground also the Court has assigned itself a surprisingly limited role. It has shown a marked deference to decisions of the Tribunal, stating, for example, in *Royal Forest and Bird Society v WA Habgood*[84] that although it was not bound by decisions of the Tribunal, "it would normally give great weight to interpretations by that Tribunal".[85] In *Stark*, the Court held that it was for the Planning Tribunal to decide whether a policy of restricting urban sprawl was consistent with the purposes and principles of the Act.[86] In *New Zealand Rail* the appellants alleged that the Tribunal had incorrectly applied Part II of the RMA which contains the purpose and principles of the Act. Grieg J stated that this Part of the Act did not lend itself to strict rules and principles of statutory interpretation but was intended to allow the application of policy in a broad and general way. He explained that "it is for this purpose that the Planning Tribunal, with special

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82 See discussion in de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5 ed, Sweet & Maxwell, London, 1995), para 22-024.

83 *Manos v Waitakare City Council* [1996] NZRMA 535.

84 (1987) 12 NZTPA 76.

85 Above n 84, 80.

86 Above n 73, 351.

expertise and skill, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act".[87]

The High Court has also effectively declined to express its views on costs awards under the Act. Under s 285 the Tribunal has a discretion to award such costs as it considers reasonable against any party. In *Hunt v Auckland City Council*,[88] the Court heard an appeal from an award of costs against objectors who had brought proceedings in order to test the validity of a resource consent. They were successful on the procedural aspect of their claim but not on the substantive aspect. Williams J noted that the Tribunal had applied the principle established in *Morton v Douglas Homes Ltd (No2)*.[89] In that case it was held that the purpose of a costs award is to impose on an unsuccessful party an obligation to make a reasonable contribution towards the costs reasonably incurred by the successful party. Williams J found that the Tribunal's award of costs could not therefore be said to have been based on any wrong legal test. However given the current debate on the topic,[90] it seems unfortunate that the Court did not take this opportunity to discuss the issue of costs awards against public interest litigants. Instead it held that the matter was largely a question for the Tribunal's discretion under s 285.[91]

On the other hand it should be noted that, despite its reservations, the Court in *Habgood* did overturn the Tribunal's interpretation of "Maori ancestral land" in s 3(1)(g) of the TCPA. Similarly, in *Shell New Zealand Ltd v Auckland City Council*[92] the Court overturned the Tribunal's interpretation of the inter-relationship between s 7(c) in Part II of the Act, and s 105(2)(b)(i) which deals with the granting of resource consents. It is not entirely clear how the more interventionist approach in these cases can be reconciled with the rather restrictive approach of the cases outlined in the above paragraphs. However it appears that the Court may be more willing to intervene in cases such as *Habgood,* where the question of law involves interpretation of a specific phrase, rather than in cases like *New Zealand Rail* where consideration of the more general purpose and principles of the Act is required.

While it is unclear how the different cases can be reconciled, the Court appears to be demonstrating a considerable degree of deference to the expertise of the Planning Tribunal. This may be appropriate where the consideration of factual evidence is

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87 Above n 67, 86.
88 [1996] NZRMA 49.
89 [1984] 2 NZLR 621.
90 See for example David Grinlinton "'Public interest' participation and costs awards under the RMA" (1996) 1 Butterworths Resource Management Bulletin 213.
91 Above n 88, 55.
92 [1995] NZRMA 490.

concerned, however there is less reason to defer to the Tribunal's decisions when a question of law is at issue. The right of appeal to the High Court is provided on the assumption that the higher Court is better able to determine the correct legal principles in a given case. One area in which the Tribunal has shown its limitations is in the interpretation of s 8 of the Act which requires that decision makers take into account the principles of the Treaty of Waitangi. Treaty jurisprudence is complex and the exact nature of its principles are uncertain. The Tribunal has handed down a number of contradictory decisions relating to whether a duty of consultation is imposed by s 8. It can be argued that a decision from the higher courts, who are better versed in Treaty issues, is required before a coherent approach to the consultation question can be established.[93]

Admittedly, Treaty issues are fairly specialised, and these criticisms may not be broadly applicable. David Williams has suggested that reliance on the superior appellate courts to determine resource management policy and the legislative intent of the Act may be misplaced. On the other hand, Sir Geoffrey Palmer has also noted the difficulties in interpreting Part II of the Act, and has suggested that the solution lies in waiting for a decision from the Court of Appeal to determine a "suitably progressive yet workable approach the Act".[94] It is submitted that it would be desirable for the Court to take a more active role in establishing the legal tests to be applied under the Act.

(d) Procedural unfairness

It is unclear to what extent the Court will intervene on the basis that the Tribunal has failed to act in a manner which is procedurally fair. While the test laid down in *Countdown Properties* makes no reference to procedural fairness, the RMA itself makes considerable provision for public input into decisions made under the Act. Thus any failure to comply with these provisions could be challenged on the ground of a failure to apply the correct legal test. It is interesting to note that the *Countdown Properties* case itself involved claims of procedural unfairness. The case concerned objections to a proposed change to a district plan. It was argued that the principles of natural justice required the Council to have prepared its report on the proposed change before the public hearing, so that objectors would have the chance to comment on it. The Court found that there was no merit in this submission. There had been a public hearing in accordance with s 39 of the Act, and appropriate and fair procedures had been observed as required by that section.[95] The Court also found that any defect in the procedure or

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93 For further discussion of this point see an earlier paper of this writer "Consultation with Tangata Whenua under the Resource Management Act 1991" Unpublished paper submitted for LLB(Hons) legal writing requirement, VUW, 1 September 1995.

94 Sir Geoffrey Palmer *Environment - The International Challenge* (VUP, Wellington, 1995) 173.

95 Above n 57, 162.

substance of the original decision would be cured by the extensive hearing before the Planning Tribunal.[96] However it is interesting that despite its earlier exclusion of procedural unfairness from the grounds of intervention, the Court did not immediately dismiss the appellants' arguments on this ground.

2 Remedies available

It should be noted that the Court will not necessarily set aside a decision even where a mistake of law is established. In *Habgood*, the Court found that it was not compelled to quash the decision or refer it back where an error of law was established. Holland J stated that "common sense leads one to hope that before an appeal is allowed on a question of law the Court must be satisfied that any error of law which it finds to have occurred is one which has materially affected the judgment".[97] Thus the Court found that although the Tribunal had incorrectly interpreted s 3(1)(g) of the TCPA, it was satisfied that consideration of the evidence and submissions under that section would have made no difference to the decision.[98] Similarly, in *Manos v Waitakere City Council*,[99] the High Court found that although an irrelevant consideration had been taken into account this would not have affected the final outcome of the decision and so declined to grant the appeal.[100] In *Habgood*, the Court stated that it was a question of law whether the error was material to the decision and that the decision must be quashed unless it could be established beyond doubt that it did not materially affect the decision.[101] However the Court of Appeal in *Manos*[102] reached a contrary conclusion with respect to the standard of proof.[103]

In *Countdown Properties* the Court discussed the correct approach to be taken to relief when an error is determined to be material. Under R718A of the High Court Rules, the Court has the power to substitute its own decision for that of the tribunal or person appealed from. However the Court in this case cited with approval the statement of Tipping J in *Port Otago Limited v Dunedin City Council*[104] that it would be unusual in an appeal on a point of law for the Court to substitute its own conclusions on the factual matters underlying the point of law for the that of the Tribunal. The Court agreed "that unless the correctly legal approach could lead to only one substitute result, the proper

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96 Above n 57, 163. See above Part III D1(a)(ii).
97 Above n 84, 81.
98 Above n 84, 82.
99 Above n 83.
100 Above n 83, 359.
101 Above n 84, 82.
102 [1996] NZRMA 145.
103 See discussion below Part III C.
104 Unreported, 15 November 1993, High Court, Dunedin Registry, AP112/93.

course is to remit the matter back to the Tribunal as R718A(2) of the High Court Rules empowers".[105]

C Appeal to the Court of Appeal

Appeal to the Court of Appeal is available under s 308 of the RMA which provides that s 144 of the Summary Proceedings Act applies in respect of a decision of the High Court under s 299 of the RMA as if the decision had been made under s 107 of the Summary Proceedings Act 1957. The circumstances in which leave to appeal will be granted under s 144 of the Summary Proceedings Act were recently considered in the cases of *Shell New Zealand Ltd v Auckland City Council*[106] and *Manos v Waitakere City Council.*[107] In *Shell,* the Court of Appeal noted that s 144(2) of the Summary Proceedings Act provides that the High Court may grant leave "if in the opinion of that Court the question of law involved in the appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to the Court of Appeal for decision".

The appeal in the *Shell* case concerned an application for a resource consent to construct a service station. The application had been refused by the consent authority and the appeal to the Planning Tribunal was equally unsuccessful. In the High Court, Temm J found that the Tribunal had misinterpreted the phrase "maintenance and enhancement of amenity" in s 7(c) of the RMA, but found that this was a general statement, and not material to the decision. In the Court of Appeal the appellant alleged that the Judge had erred in so describing the Tribunal's misinterpretation. The Court of Appeal found that this was not a question of law satisfying the criteria under s 144.[108] Richardson P stated that at most the appellants allegation "is an argument that the Judge incorrectly interpreted the Tribunal's application of the relevant law to the facts. The Judge's conclusion in that regard...involved an analysis of the Tribunal's assessment of the facts and its conclusions from the facts...It did not require determination of any significant legal questions".[109]

In *Manos*, the High Court judge similarly found that the Tribunal had made an error of law but determined that as the errors were not material the matter should not be remitted

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105 Above n 57, 181.
106 [1996] NZRMA 189.
107 Above n 102.
108 Above n 106, 192.
109 Above n 106, 192.

to the Tribunal for a rehearing. Counsel for the appellant submitted that there was a possibility that there would be a different decision upon reconsideration by the Tribunal. He argued that the appeal should be entertained under the "any other reason" limb of s 144 of the Summary Proceedings Act in order to avoid a sense of injustice arising from the decision to refuse a rehearing despite the fact that numerous errors of law had been committed. The appellants were entitled to have their application considered on the correct legal basis. Counsel also stressed the need for the Court to oversee the transition from the former Town and Country Planning approach to the "new and very different" Resource Management approach.

The Court of Appeal stated that it was satisfied that the refusal of an application for a resource consent is not appropriate for a second appeal "unless it is likely to have an impact going beyond the particular case".[110] The Court then discussed the test to be applied in assessing whether an error is material, stating that " we do not accept that some higher test such as satisfaction as to immateriality beyond reasonable doubt to be required. The test as to immateriality is one of judgment rather than proof to a standard".[111] Thus the Court found that the judge had applied the correct test and so refused leave to appeal against his decision. This judgment would appear to overrule the earlier decision of the High Court in *Habgood*. As noted above, it was held in that case that a decision must be quashed or referred back unless it was established "beyond a reasonable doubt" that the error was not material to the decision. Surprisingly however, this decision was not referred to by the Court of Appeal in *Manos*. Nor did the Court address the issue of its role in developing the correct approach to the new regime established by the RMA.

110 Above n 102, 148.
111 Above n 102, 148.

D Judicial Review

Like appeal, judicial review also serves an important function in ensuring that the law is correctly and faithfully applied. However unlike a general appeal, it is not concerned with reviewing the merits of a decision, but looks rather to the manner in which those decisions are made. In the context of the RMA, it appears that not much consideration was given to the role of judicial review. An examination of the Resource Management Law Reform working papers shows considerable concern as to the role of appeal, but very few references to the role of review. The working papers make reference to judicial review in the context of enforcement provisions[112] but not with respect to the consent process. Kenneth Palmer notes that the function of the Tribunal on appeal may take on elements of judicial review but does not address the role of review itself.[113] This part of the paper discusses the potential for judicial review of the resource consent process, and examines the role it has already played.

1 Availability of review where there exists a right of appeal

(a) Review of a consent authority's decision

(i) Application for review where appeal right not exercised

Prior to 1977, when the new Town and Country Planning Act was introduced, there was no restriction on the inherent jurisdiction of the High Court to hear applications for judicial review. However s 166 of the 1977 Act provided that review would not lie until any right of appeal to the Planning Tribunal had been exhausted. In his review of that Act, Anthony Hearn noted that this provision had been included "perhaps because of the specialist nature of the role of the Tribunal".[114] The restriction on review contained in s 166 of the earlier act appears to have been carried through into s 296 of the RMA without much comment. The provision has been described not as a complete ouster of the Court's jurisdiction, but a postponement until the decision has been reviewed by the Planning Tribunal on appeal. However there has been some debate on the extent to which the provision precludes review. While there has not been any recent case law discussing the effect of s 296, guidance can been sought from earlier decisions involving s 166 of the TCPA.

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112 DJ Bewick *Resource Management Law Reform: Enforcement and Compliance Issues in Resource Management - Working Paper No 30* (Ministry for the Environment, Wellington, 1988), 19.

113 Above n 51, 26.

114 Anthony Hearn *Town and country planning reform* (Economic Development Commission, Wellington, 1987), 97.

The leading case on the interpretation of s 166 of the TCPA is *Love and Robson v Porirua City Council.*[115] That case concerned a proposal by the Porirua City Council to put three tennis courts on part of a public reserve. At the hearing of its own application, the Council passed a resolution on the casting vote of the Chair authorising the construction of two tennis courts. Mr and Mrs Love, who had been unsuccessful objectors, lodged an appeal to the Planning Tribunal. However, before the appeal was heard, they also made an application for judicial review to the High Court on the grounds that first, the use of the casting vote was unlawful and secondly, that there was a breach of natural justice for reasons of bias. A similar application was made by Mrs Robson who had not made an objection at the initial hearing and did not therefore have a right to appeal. The judicial review proceedings were moved by consent to the Court of Appeal.

The Council rejected the applicants' contentions, but also argued that by virtue of s 166, the application should be struck out on jurisdictional grounds. In response, the applicants cited a number of cases in support of the proposition that, as a result of the alleged breach, the decision of the council was a nullity and legally ineffective for the purpose of founding an appeal.[116] In essence the applicants were advocating that the Court adopt an approach sometimes described as "the absolute theory of invalidity".[117] However, the Court of Appeal, applying some recent English authorities found that the cases cited by the applicants were wrongly decided. The Court referred to the decision of the Privy Council in *Calvin v Carr*[118] in which it was held that a decision made contrary to natural justice might be void, but that until it was so declared by the Court it might continue to have some effect or existence in law.[119] The Court noted that this approach had already been adopted in New Zealand in the case of *AJ Burr Ltd v Blenheim Borough Council.*[120] In that case it was held that except in rare cases of "flagrant invalidity" a decision that is alleged to be defective will be recognised as operative unless set aside.[121]

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115 (1984) 10 NZTPA 53.

116 *Duncan v Thames-Coromandel District Council* (1980) 7 NZTPA 65; *Routley v Bay of Islands County* Unreported, 18 June 1980, High Court, Whangarei Registry, M7/80; *Denton v Auckland City Council* [1969] NZLR 256.

117 For further discussion, see M Taggart "Rival Theories of Invalidity in Administrative law: Some Practical and Theoretical Consequences" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986).

118 [1980] AC 574.

119 Above n 118, 588.

120 [1980] 2 NZLR 1.

121 Above n 120, 4.

This approach has been subsequently approved in a number of cases. In *Golden Bay Cement Company Ltd v Commissioner of Inland Revenue*,[122] the Court of Appeal cited *Love* and held that an appeal would lie against a purported decision of the Commissioner because such a decision was valid until determined otherwise by the Court.[123] The decision in *Love* was also cited in *Martin v Ryan*[124] in which it was noted that the demise of the absolute theory of invalidity was now complete in New Zealand.[125] However the Court also considered when an example of "flagrant invalidity" might arise. Fisher J stated that "to be irrevocably void ab initio, one would have to be able to confidently postulate at the time of the purported decision that the defects were so fundamental that regardless of such subsequent events, no Court acting according to recognised legal principles could ever in the exercise of its discretion withhold a remedy".[126]

Fisher J also suggested that the effectiveness of a privative clause "would seem to turn upon inferred statutory intention as it applies to each case, rather than any conceptual differences between 'flagrant' and 'non-flagrant' categories".[127] This is consistent with the decision of the Court of Appeal in *Bulk Gas User's Group v Attorney-General*[128] in which it was held that it would be a question of statutory interpretation as to whether Parliament had intended to empower an administrative tribunal to determine conclusively a question of law.[129] In the context of the s 296 of the RMA, Parliament's intention appears to be that any problem with the decision of the consent authority should be dealt with initially by the Planning Tribunal. This approach would rule out almost any challenge by way of judicial review where there lies an unexercised appeal right against the decision.

It is interesting to note that in *Love v Porirua City Council*, the Court declined not only that the application of Mr and Mrs Love, but also that of Mrs Robson. Although she herself did not have a right to appeal, the Court noted that she had the right under s 157[130] of the TCPA to join in an appeal lodged by Mr and Mrs Love. It was said that until this right was exhausted "the judicial review application should as a matter of common sense and for reasons of fairness to any parties to an appeal be held in

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122 (1996) 7 NZTC 12,580.
123 Above n 122, 12,585.
124 [1990] 2 NZLR 209.
125 Above n 124, 236.
126 Above n 124, 238.
127 Above n 124, 237.
128 [1983] NZLR 129.
129 Above n 128, 136.
130 Replaced by s 274 in the RMA.

abeyance or as a matter of discretion [be] struck out as premature".[131] Thus it would appear that where one party has an appeal right, other parties will also be barred from seeking judicial review of the same matter. It might be questioned whether the same reasoning should apply where the other party is denied standing on the appeal. As noted in Part III A of this paper, the Planning Tribunal has shown a marked reluctance in granting standing to persons who are not party to the appeal. It is thus conceivable that a person in the position of Mrs Robson could have her application for review declined, and then be denied the right to appear before the Tribunal. In this situation, it might be argued that there had been a breach of her right to natural justice under s 27(1) of the Bill of Rights.

(ii) Application for review once the appeal right has been exercised

It appears from the preceding analysis that review will not lie until the Planning Tribunal has heard an appeal on the matter. However it is less clear what the position is once the appeal right has been exercised. The question which arises is whether the applicant is entitled to have her case reheard by the original decision maker or whether the defects in the original decision are "cured" by the appeal hearing. This question has been discussed in a number of cases. In *Love* it was held that the appeal hearing would cure any defect in the original process. The Court in that case cited the decision in *Wellington Club Inc v Carson*[132] in support of the proposition that "the appeal itself will enable a complete rehearing de novo, in the course of which any suggestion of earlier defect or error can be examined and where necessary corrected".[133] However it should be noted that while the Court in *Carson* expressed the view that the jurisdiction of the Planning Tribunal was original and not appellate, it did not make specific mention of its ability to cure defects in the original decision. Furthermore, the Court appears to have over-looked considerable authority to the contrary view.

In *Reid v Rowley*[134] the Court of Appeal held that an appeal does not *normally* cure a breach in natural justice in the original hearing so as to oust the jurisdiction of the Courts to redress breaches of natural justice.[135] Cooke J expressed the view that the powers of the Planning Appeals Board would come within this category of "normal" cases. This dicta had been subsequently applied in the planning case of *Anderton v Auckland City Council*[136] despite the invitation of counsel to disregard it as obiter.

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131 Above n 115, 56.
132 [1972] NZLR 698.
133 Above n 115, 55.
134 [1977] 2 NZLR 472.
135 Above n 134, 481.
136 [1978] 1 NZLR 657.

Mahon J added that he preferred the view that the jurisdiction of the Tribunal was appellate and not original.

Furthermore, in *Calvin v Carr* itself it was stated that planning decisions were a typical case in which the complainant has a right to "nothing less than a fair hearing at both the original and appeal stage".[137] The Privy Council in that case did note that it was not possible to lay down a general rule on the question as to whether a defect could be cured by a rehearing, noting that there were a wide range of situations and rules for which this question would arise.[138] Again it should also be noted that there is a difference between the planning appeals systems in New Zealand and the UK. Thus it might be argued that the fact the Tribunal hears an appeal de novo makes it more likely that a defect in the original decision will be cured.

In New Zealand, the most recent discussion of this issue was in *Countdown Properties* which concerned with the jurisdiction of the High Court on an appeal from the Planning Tribunal. The Court referred to the decisions in *Love, Calvin v Carr,* and *Burr* and found that this was a case in which any defects at the council hearing were cured by the thorough hearing by the Planning Tribunal.[139] The Court does however appear to acknowledge that, consistently with *Calvin v Carr*, there may be instances where a defect would not be not be cured. This would be consistent with the earlier decision in *Anderton*. However it should be noted that *Anderton* was decided under the Town and Country Planning Act 1953 which did not contain a provision equivalent to s 166 of the TCPA 1977 or s 296 of the RMA.

Thus it can be seen that the case law, both in New Zealand and in other jurisdictions, does not to lay down a clear rule as to whether an appeal can cure a defect in the original decision.[140] However in the context of the RMA it would seem illogical for the Tribunal to remake a decision and then have it referred back to the consent authority for a rehearing. In this respect it is significant that the Tribunal hears the case in its entirety and effectively remakes the whole decision. On the other hand, it is important that consent authorities be required to observe the principles of natural justice. A specific finding of the Court on review would bring this point home more explicitly. However it is submitted that the factors in favour of allowing review are outweighed by those suggesting that it should not be allowed.

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137 Above n 118, 592.

138 Above n 118, 592.

139 Above n 57, 163.

140 A discussion of decisions in overseas jurisdictions can be found in Jayaprakash Sen "Can defects of natural justice be cured by appeal? *Union Carbide v Union*" (1993) 42 International and Comparative Quarterly 369.

(b) Review of a Planning Tribunal decision

Another possibility is that review might be sought of the decision of the Planning Tribunal. While there is no provision in the RMA restricting judicial review at this stage, there does exist a right of appeal on a point of law against any decision of the Tribunal on a resource consent application. Where there is such a right of appeal, the situation is complicated by the fact the Court may in its discretion refuse relief if other remedies have not been exhausted. The British Law Commission has recently endorsed this proposition, stating that in its view it is important that judicial review "be seen as a residual jurisdiction and, save in exceptional circumstances, not one to be invoked where there is an alternative remedy".[141] The Commission notes that there is a need to identify the scope of the rule,[142] and suggests that the adequacy of the alternative remedy should define the scope of the principle.[143] It suggests that a legal alternative remedy should be regarded as an adequate alternative remedy,[144] and that where such a remedy exists, an application for review should not proceed to a substantive hearing unless the applicant can show that judicial review is nevertheless the appropriate remedy.[145] In relation to this final point, the Commission noted that a number of consultees had expressed concern that the applicant be entitled to apply for judicial review both of the appeal and of any matters involved in the original decision which were not adequately remedied by the appeal.[146]

It does not appear that an attempt has yet been made to review a decision of the Planning Tribunal where there exists the right of appeal under s 299. If the Commission's recommendations are adopted in New Zealand, then this would appear to exclude the possibility of judicial review of Planning Tribunal decisions in favour of appeal to the High Court under s 299 of the RMA. However, other commentators have argued that the courts should not require other remedies to be exhausted before relief is granted by way of judicial review.

Lord Bingham has noted that there have been few cases where relief has been denied on the basis of an alternate remedy being available, and has expressed satisfaction that this should be so, saying that "It would seem to me on the whole desirable that when unlawful conduct is proved before a court of justice, it should generally be willing to say so and grant relief, whether an equally convenient, beneficial and effectual

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141 Above n 60, para 2.5.
142 Above n 60, para 3.24.
143 Above n 60, para 3.25.
144 Above n 60, para 5.32
145 Above n 60, para 5.35.
146 Above n 60, para 5.35.

alternative remedy exist or not".[147] Timothy Pitt-Payne argues that the theoretical basis for review is that it performs a different function to appeal; that judicial review is concerned with the legality of the decision, and not its merits.[148] He notes that in "exceptional circumstances"[149] the courts will entertain applications for review even where alternate remedies have not been exhausted. He suggests that the availability of review will depend on the facts of the case, and cites a number of cases in which it was held that review would lie despite the existence of an appeal.

The cases cited by Pitt-Payne are those in which the right to appeal would be useless,[150] or where review would be quicker, cheaper and more efficient.[151] However these arguments may be less persuasive in a context such as the RMA where the appeal available is appeal on a point of law. In this situation it is more difficult to distinguish the function of the court on appeal and review. De Smith suggests that any ground of challenge available under a judicial review action is now available also for an appeal on a point of law.[152] However, as will be discussed in more detail in Part IV of this paper, some differences between appeal under s 299 of the RMA and judicial review of decisions can be detected. In particular, it is not clear whether appeal will lie against the decision of the Planning Tribunal on the ground of procedural unfairness. It follows that if appeal is not available on this ground, then the Court should be willing to grant relief on an application for review. It is interesting also to note that in UK planning decisions, the courts have considered that in appropriate circumstances judicial review is not precluded by the statutory appeal process.[153] Thus a fairly strong argument can be made that in New Zealand also there may be circumstances in which a decision of the Planning Tribunal is open to review.

2 *Review where there is no right of appeal*

At this stage, the debate as to whether review will be available against an appealable decision, remains largely theoretical. However judicial review has been held to lie against the decision of a consent authority or the Planning Tribunal where there is no

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147 Sir Thomas Bingham "Should Public Law Remedies be Discretionary?" [1991] Public Law 64, 72.

148 Timothy Pitt-Payne "Restrictions on Remedies" in M Supperstone and J Goudie (eds) *Judicial Review* (Butterworths, London, 1992), 342.

149 The basis of this test stems from the judgment of Sir John Donaldson in *R v Epping and Harlow General Comrs, ex p Goldstraw* [1983] 3 All ER 257, 262.

150 *R v Chief Immigration Officer Gatwick Airport, ex p Kharazzi* [1980] 3 All ER 373; 1 WLR 1396.

151 *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720; *Ex p Waldron* [1986] 1 QB 824.

152 Above n 82, para 15-076.

153 Above n 82, para 22-005.

right of appeal. Thus, for example, the Court has heard an application for review of the Planning Tribunal's decision to grant a discharge of an interim enforcement order.[154] In respect of resource consent decisions, it has been noted above that a right of appeal lies against any decision of a local authority. However that right is only conferred on the applicant or any person who has made a submission on the application. While any person has the right to make a submission on a notified application, an interesting situation arises where an application is not notified. In these circumstances there is no right to make a submission, and therefore no right to appeal against the decision of the consent authority.[155] Instead, judicial review has been sought of the decision not to notify the application. Similarly, it has been indicated that an application for review may be the only approach available in relation to decisions to grant certificates of compliance.[156] Again, a right of appeal against this decision is conferred only on the applicant. However, to date it is the non-notification decisions which have provided the largest body of judicial review decisions under the Act.

The discretion not to notify applications is conferred by s 94 of the RMA. That section provides that an application for a discretionary or non-complying activity need not be notified if (a) the consent authority is satisfied that the effect on the environment will be minor, and (b) written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent, unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.[157] It should first be noted that the discretion is phrased subjectively, that its exercise is dependent on the consent authority being "satisfied" that the preconditions in subsections (a) and (b) are satisfied. Furthermore, a determination that the effect on the environment is "minor" will require some degree of judgment rather than the application of a strict legal test.

(a) Grounds of review

The first case involving an application for review of a decision made under s 94 was *Quarantine Waste Ltd* v *Waste Resources Ltd.*[158] The Court noted that Act clearly confers a discretion on the consent authority not to notify an application, and that it is not for the Court to substitute its own decision for that of the consent authority. Blanchard J stated that the role of the Court is to determine "whether proper procedures

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154 *Ngati Rangatahi Whanaunga (Association) v The Planning Tribunal* [1995] NZRMA 481.

155 *Aro Valley Community Trust Inc v Wellington City Council* (1992) 1 NZRMA 221.

156 *Strathmore Park Progressive and Beautifying Assoc Inc v Anglian Water International (NZ) Ltd* [1996] NZRMA 11, 14.

157 RMA s 94(2). Note that slightly different requirements apply to non-notification of other types of activity.

158 [1994] NZRMA 529.

were followed, whether all relevant and no irrelevant considerations were taken into account and whether the decision was reasonably made".[159] This seems to be a restatement of the three established grounds of judicial review of procedural impropriety, illegality and irrationality.[160] Subsequent cases have however tended to focus on illegality and irrationality as opposed to procedural impropriety. The only case to discuss procedural propriety was *Carter* v *North Shore City Council*[161] in which the applicants argued they had a legitimate expectation that the application would be notified. The Court found, however, that there could be no such expectation as the consent authority had specifically stated that it would reserve the right to notify or not notify the application.[162] In *Worldwide Leisure Ltd* v *Symphony Group Ltd*[163] the Court made no mention of procedural propriety as a ground of review, citing a passage from *Carter* that the consent authority was required to "take into account all relevant matters and to act rationally and otherwise lawfully in connection with a decision to approve".[164]

By contrast, illegality has been raised as a ground of review in a number of cases. In *Quarantine Waste*, the applicants argued that the consent authority's decision was unlawful as it had failed to consult with tangata whenua as required by s 8 of the RMA. The Court noted that the consent authority was relying on the fact that the applicant had consulted extensively itself. While it expressed reservations about second hand consultation in general, it found that in this case the failure to consult did not result in the consent authority failing to take into account any relevant considerations.[165] As a result, the Court found that even if the authority itself did have a duty of consultation, the Court would exercise its discretion not to grant relief.[166] In *Worldwide Leisure*, the Court again stated that failure to consult with the tangata whenua would give rise to an allegation of failure to comply with the requirements of the RMA.[167] This failure was particularly important in this case as it was believed that the site of the proposed development might contain a spring sacred to the Ngati Rauhoto people. The Court granted Ngati Rauhoto's application for review and the consent authority's decision was quashed.[168]

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159 Above n 158, 540.

160 As outlined by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935.

161 Unreported, 10 May 1994, High Court, Auckland Registry, M 1112/93.

162 Above n 161, 8.

163 [1995] NZAR 177(HC).

164 Above n 161, 9; Above n 163, 188.

165 Above n 158, 542.

166 Above n 158, 542.

167 Above n 163, 187.

168 Above n 163, 192. Note that the Court's decision in relation to the other applicants in this case was vacated by consent. The decision in relation to Ngati Rauhoto's claim, however, stands.

The question as to whether the consent authority had applied the correct legal test arose in *Roydhouse* v *Hawkes Bay Regional Council.*[169] The Court found that the authority was correct in assuming that an activity "lawfully established" could be an activity so established under previous planning law and was not limited to activities lawfully established under the RMA as the applicant argued.[170] However in *Burton* v *Auckland City Council*[171] the Court held that the consent authority had not applied the correct legal test in relation to an application to remove a large number of trees from a very steep slope. Blanchard J found that the consent authority should not have considered removal of the trees in isolation, but should have looked to the impact their removal would have on the stability of the slope.[172] In failing to do so, the authority had omitted to take into account a relevant factor. Thus the Court found that interim relief should be maintained against further removal of trees from the slope.

It is on the grounds of unreasonableness that most applicants have sought to challenge non-notification decisions. However the Court's exercise of review on this ground has proved problematic. In a number of cases the applicant has alleged that a decision not to notify was unreasonable on the basis that there was evidence that the effects on the environment would be more than minor, or that there were persons who would be affected by the granting of the application. However the Court has noted that while the decision maker must take into account relevant considerations, the weight to be accorded to particular matters is for the consent authority to determine.[173] Similarly, the Court has found that where there is competing evidence, it cannot be said that the decision to prefer one set of evidence is unreasonable.[174] Nor is it necessarily unreasonable for an authority to make a decision contrary to the advice of its own planner.[175] On the other hand, in *Carter*, the Court found that a consent authority's decision that only two people would be affected by a proposed development was not beyond challenge on the ground of unreasonableness.[176] It should be noted, however, as this conclusion was reached in relation to an application for a strike out order, it was not necessary for the Court to determine the matter conclusively.

The nature of the Court's power on review for unreasonableness was discussed in the *Worldwide Leisure* case. Cartwright J noted that "the consent authority has a wide

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169 Unreported, 6 May 1994, High Court, Napier Registry, CP 15/94.
170 Above n 169, 6.
171 [1994] NZRMA 544.
172 Above n 171, 554.
173 Above n 158, 540.
174 Above n 169, 8; above n 163, 189.
175 *Elderslie Park Ltd* v *Timaru District Council* [1995] NZRMA 433, 446.
176 Above n 161, 8.

discretion and except in circumstances which might amount to a decision made unreasonably or irrationally (in the public law sense of that term), the Court will be reluctant to intervene".[177] She also stated that weight is usually only a ground for intervention if the decision maker has placed no weight on a relevant factor.[178] She put forward the constitutional argument that as Parliament has entrusted decision making responsibility in this area to local authorities, the Court should not interfere by making its own decision on the merits. From a pragmatic perspective, the consent authority has the relevant expertise which the Court will not possess.[179] However it should be noted that the law is presently unclear as to whether incorrect weight can invalidate a decision. It has been suggested in both New Zealand and Australian case law that weight may provide a basis for setting aside a decision,[180] but a recent decision of the Australian High Court states that the weight to be given to the material before the decision maker is for him or her to decide.[181]

Cartwright J also cited the case of *Puhlhofer v Hillingdon London Borough Council*[182] in which it was held that review on a mistake of fact was limited to situations in which the decision maker was acting "perversely". She stressed that if this approach were not taken, and the Court were evaluate competing scientific evidence, then it would be looking into the merits of the application.[183] However, despite the dicta in *Puhlhofer* there have been cases in which the courts have applied a somewhat less restrictive test for intervention where there is an alleged mistake of fact. It is particularly interesting to note that in the United Kingdom the Court has set aside a number of planning decisions where the decision maker had made a material mistake of fact.[184] However it is unclear whether these decisions can be seen as support for the proposition that mistake of fact stands as a ground of review in its own right, or whether these decisions more properly come within the ground of unreasonableness.[185] In *Secretary of State for Education and Science v Tameside MBC*[186] it was suggested that review could lie where the decision maker had acted upon an incorrect basis of fact. That case was referred to by Cooke P in *Daganayasi v Minister of Immigration*[187] in which he held that the

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177 Above n 163, 181.
178 Above n 163, 188.
179 See discussion of constitutional and pragmatic reasons for restraint in J Caldwell "Factual Review in Judicial Review [1988] NZLJ 339.
180 See for example *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299; *Thames Valley Electric Power Board v NZFP Pulp & Paper* [1994] 2 NZLR 641.
181 See for example *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* Unreported, 27 May 1996, High Court of Australia.
182 [1986] AC 484; [1986] 1 All ER 467.
183 Above n 163, 189.
184 Above n 81.
185 Above n 81.
186 [1977] AC 1014.
187 [1980] 2 NZLR 130.

Minister's decision was invalid on the ground of mistake of fact as well as the ground of procedural unfairness.[188] However in the later case of *New Zealand Fishing Industry Association Inc* v *Minister of Agriculture and Fisheries*[189] Cooke P appeared to limit mistake of fact to unreasonable mistake of fact, stating that "to jeopardise validity on the ground of mistake of fact the fact must be an established one or an established and recognised opinion; and that it cannot be said to be a mistake of fact to adopt one of two differing points of view of the facts, each of which may be reasonably held".[190]

(b) Standing

The issue of standing is important to the scope of judicial review because in its absence, the court has no jurisdiction over the administrative action being challenged.[191] There has been some discussion of standing requirements in the non-notification decisions, with a particular focus on the standing rights of public interests litigants and trade competitors. However there appears to be some confusion concerning the test for standing in these cases. This may be due in part to the fact there is no statutory definition of standing requirements in New Zealand. The JAA is silent in this respect, and as a result standing rules have been developed through the common law. Traditionally different standing rules applied depending on which remedy was being sought. Thus on an application for a declaration or injunction the applicant would have had to show damage different in quality from or substantially greater than that of the public generally.[192] On an application for certiorari, prohibition or mandamus different tests would be applied.[193]

However the decision in *Re Royal Commission on Thomas Case*[194] suggests that the previous rules of standing for each prerogative writ were not imported into the JAA. Instead the courts have followed the decision of the House of Lords in *Inland Revenue Commissioners* v *National Federation of Self-Employed and Small Businesses Ltd*,[195] that except in exceptional circumstances, the courts should be able to review any serious breach of a public duty notwithstanding an applicant's alleged lack of standing.[196] In

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188 Above n 187, 149.
189 [1988] 1 NZLR 544.
190 Above n 189, 552.
191 Above n 82, para 2-001.
192 *Boyce v Paddington Corporation* [1903] 1 Ch 109.
193 See GDS Taylor *Judicial Review - a New Zealand Perspective* (Butterworths, Wellington, 1991), paras 4.13 - 4.28.
194 [1980] 1 NZLR 602.
195 [1982] AC 617.
196 See for example *Environmental Defence Society Inc* v *South Pacific Aluminium Ltd* (No 3) [1981] 1 NZLR 216; *Consumers Co-operative Society Manawatu Ltd* v *Palmerston North City Council* [1984] 1 NZLR 1.

Hallett v Attorney General[197] the Court noted the development of a more liberal attitude to standing and stated that the Court should be reluctant to reject a claim on technical grounds where there were matters of genuine public interest warranting judicial examination.[198] An observation along the same lines was made recently in *North Shore City Council v Waitemata Electric Power Board.*[199]

A similar liberalisation of standing rules has been noted in the United Kingdom. By contrast with the New Zealand position, RSC Order 53, rule 3 specifies a single test for standing of whether the applicant has a "sufficient interest" in the matter to which the application relates. A recent report of the British Law Commission considered the question of whether standing rules are necessary at all.[200] A majority of those consulted by the Law Commission did not question the need to establish standing,[201] however concern was expressed that standing rules should not exclude public interest challenges. The Commission recommended that a "two-track" system of standing be adopted, in which the first track would cover people personally affected by the decision, and the second would be a discretionary track covering matters including public interest challenges.[202] This position is consistent with recent English case law allowing public interest litigants standing.[203]

In the context of non-notification decisions, standing rules take on a particular significance because the discretion which is being challenged relates itself to limits on public participation. A narrow approach to standing would mean that the decision maker's discretion would be incapable of scrutiny or challenge. On the other hand, from the perspective of a commercial developer seeking a non-notified consent, it is important that the function of the decision maker is not disrupted unnecessarily by expensive and lengthy litigation.[204]

In *Quarantine Waste*, the Court cited with approval the *Self-Employed* case, noting that it would be important to consider questions of standing in the legal and factual context of each case, and that standing requires a sufficient interest in the matter to which the application relates.[205] Blanchard J stated that a liberal approach should be taken to

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197 [1989] 2 NZLR 96.
198 Above n 197, 103.
199 Unreported, 3 September 1993, High Court, Auckland Registry, CP88/93.
200 Above n 60, para 5.16.
201 Above n 60, para 5.18.
202 Above n 60, para 5.20.
203 *R* v *HM Inspectorate of Pollution, ex p Greenpeace Ltd (No. 2)* [1994] 4 All ER 239 and *R* v *Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386.
204 Above n 82, para 2-005.
205 Above n 158, 535.

standing where environmental concerns were at issue. However, in finding that a trade competitor would not have standing, he referred to the fact that a competitor would not be affected any more than the public generally.[206] Although he did not identify it as such, this appears to be a reference back to the test established in relation to objection rights under the Town and Country Planning Act 1953.[207] Confusion arises because s94 uses very similar wording, requiring the written permission of any person "adversely affected". Thus it is not clear which test the Judge is referring to when he states that "whether or not the consent authority acting under s 94(2) is correct in thinking that the adverse effect on the environment will be minor, a challenge to its decision can be made only by someone who has been "affected" by the decision and has not given written approval."[208] It would appear that he cannot be referring to "adversely affected" in s 94(2)(b) because he later suggests that a public interest group would have standing to challenge the consent authority's decision, and such a group would not come within that subsection. This suggests that the Judge is again making reference to the earlier test for standing.

The slight confusion apparent in *Quarantine Waste* was carried through into the decision of the Court in *Worldwide Leisure*. Cartwright J approved the observation in *Quarantine Waste* that a liberal approach should be taken to standing where environmental issues are at stake. She then referred to the test for standing under the TCPA of a person affected more than the public generally, and agreed with counsel's submission that this test was no longer relevant. She found that under the new statutory regime "the measure is the impact on each person or party".[209] In coming to this conclusion, she relied on the definition of "effect" in s 3 of the RMA, stating that "the very breadth of the definition contemplates that both persons who are directly affected and those on whom the immediate impact is less will have standing."[210] However this statement appears to confuse the definition of "effect" under the RMA with the test for standing. It is submitted that while the definition of "effect" in the Act is relevant to whether the consent authority has correctly exercised its discretion under s94, it should not be used as a means of determining the preliminary question of whether the applicant has standing.

Apart from the conceptual distinction already discussed, there are also practical consequences of confusing the RMA definition of "affected" with the test for standing on a judicial review action. It is probably accurate to say that most applicants will be

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206 Above n 158, 536.
207 *Blencraft Manufacturing Co Ltd* v *Fletcher Development Co Ltd* [1974] 1 NZLR 205.
208 Above n 158, 535.
209 Above n 163, 184.
210 Above n 163, 183.

seeking review on the basis that they are persons "adversely affected by the granting of the application" whose written consent has not been obtained pursuant to s 94. In these cases it will make little practical difference if a court uses the same test for standing. However, De Smith points out that although the statute conferring the discretion may expressly or impliedly identify certain people as having an interest in the subject matter of the application, there may be other "less obvious situations" where the applicant may have an interest in the matter.[211]

The position of public interest groups is another important consideration. In *Quarantine Waste* the Court emphasised the need for public interest groups to have standing where environmental issues are at stake. However it is unclear how such a group would show that they were "affected" in the terms of the test laid down in that case, or in *Worldwide Leisure*. It is submitted that a clearer test similar to the English approach would be preferable. Given that the *Self-Employed* case has already been accepted as good law in New Zealand, this would not represent a departure from established precedent. The courts should also refrain from looking to tests for standing developed through the statutory appeal structure of the Planning Tribunal. This issue is of particular importance given the decision of the Planning Tribunal in *Purification Technologies Ltd* v *Taupo District Council*[212] and subsequent cases in which it has been held that public interest groups do not have standing.

Finally, the position of trade competitors deserves some consideration. Under previous planning legislation, it had been held that evidence of an adverse economic effect was sufficient to give a trade competitor standing.[213] A business interest was generally held to be sufficient to show standing under the JAA.[214] As a result, the planning process was often used as a means of blocking a competitor's application.[215] Not surprisingly, the drafters of the RMA sought to avoid this situation by providing in section 104(8) that "when considering an application for a resource consent, a consent authority shall not have regard to the effects of trade competition on trade competitors." Although this provision has proved largely ineffective in preventing trade wars under the Act itself,[216] the courts have used it to deny standing to trade competitors upon application for judicial review.

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211 Above n 82, para 2-024.
212 Above n 27.
213 Above n 207.
214 See eg *Budget Rent-A-Car Ltd* v *Auckland Regional Authority* [1985] 2 NZLR 414; *Consumers Cooperative* case, above n 40.
215 K Tremaine et al *Trade Competition and the Resource Management Act.- Proposed Reforms* (KPMG, Auckland, 1995).
216 Above n 215.

In *Quarantine Waste* it was held that adverse economic effect could not be used to differentiate the applicant from the public generally because this was not something a consent authority could consider when considering whether to grant a resource application under s 104.[217] This is another example of the Court narrowing standing requirements by reference to the RMA. Again, it is true that a trade competitor would fail to satisfy the requirements of s 94(2)(b) and could not therefore argue that it were a person "adversely affected" in terms of that subsection. However the approach of the Court to standing would also rule out a trade competitor who sought review of a decision on the basis that the adverse effect on the environment would be more than minor in terms of s 94(2)(a). In the context of the RMA, arguments have been made in favour of allowing trade competitors to participate in a role of "public watchdog".[218] However it has also been shown that they can act as a significant impediment to the process.[219] Subsequent cases have affirmed the approach of the Court in *Quarantine Waste*.[220] While this could be seen as an implicit rejection of "public watchdog" type arguments, it is submitted that greater consideration be given to the desirability or otherwise of allowing trade competitors to intervene in this role. This position is supported by a recent statement of the Planning and Development Select Committee that "trade competitors must still be able, in the same way as any other person, to make submissions setting out legitimate environmental concerns".[221]

A final point that can be noted in respect of standing under the Act is the availability of relator proceedings. This type of proceeding can be used by a person seeking to enforce a public interest. Under Rule 95 of the High Court Rules, a person may apply to the Attorney-General for approval as a relator. The Attorney-General always has standing to protect the public interest and so, by lending his name to the application, can overcome any lack of standing on the part of the individual concerned. It does not appear that this avenue has yet been followed in the resource management context. However in theory it remains open to any public interest group, or possibly even a trade competitor, who was concerned about being be able to show that they were "affected" in terms of the test laid down in *Quarantine Waste*.

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217 Above n 158, 536.

218 Word length precludes a lengthy discussion in this paper but see eg *Foxley Engineering Ltd* v *Wellington City Council & Mobil Oil NZ Ltd* W12/94 and discussion in Andrea MacKay "Section 104(8) and Trade Competitors" Unpublished LLB(Hons) paper VUW, 1995.

219 See MacKay, above n 218.

220 Above n 163; above n 175.

221 Planning and Development Select Committee *Commentary on Resource Management Amendment Bill (No 3).*

IV EVALUATION

A Review of the Initial Resource Consent Decision

The preceding analysis has shown that by virtue of s 296 of the Act, the potential for judicial review of appealable consent decisions is limited if not non-existent. Instead, this role is assigned to the Planning Tribunal. An examination of the judicial review cases concerning non-notification decisions suggests that this position is desirable. The applications for review of non-notification decisions have been concerned primarily with questions of disputed fact. These questions are unsuited to an application for judicial review which is concerned with the manner in which the decision was made, not with an evaluation of the case on its merits. The Planning Tribunal, by contrast, is ideally suited to the task of reviewing factual evidence and possesses the necessary expertise to do so. Furthermore, from the perspective of the participant in the resource management process, judicial review may be complex, costly and lengthy process. It runs counter to the aims of the resource management reform, which included providing a simpler more efficient process, to have a situation in which judicial review is the only means of challenging these decisions.

Another problem with the present position concerning the non-notification of consent applications is that no one body has jurisdiction with respect to all aspects of the consent process. This has resulted in plaintiffs being obliged to lodge simultaneous applications to the Planning Tribunal and the High Court. In *Hunt v Auckland City Council and St James Group Ltd*[222] the plaintiffs alleged that the purported decision of the City Council to grant the resource consent was void because the person making the decision lacked authority to do so. They also argued that the consent authority had erred in granting the consent on a non-notified basis. In relation to the first allegation, an application for a declaration was made to the Planning Tribunal. However in relation to the non-notification issue the only avenue of redress was to apply to the High Court for interim relief against the Council issuing a new consent otherwise than on a notified basis. The two applications were heard on the same day, thus neither judge had the benefit of the other's findings.

In the High Court Blanchard J declined to grant the application for interim relief, finding that if the Tribunal did find the original consent to be void, this would result in substantial loss to the St James Group should the Council be prevented from issuing a fresh consent. He found that it would be unreasonable for the plaintiffs to seek such an

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222 A64/94; Unreported, 8 August 1994, High Court, Auckland Registry, CP 366/94.

injunction unless they were prepared to give an undertaking as to damages. The Judge also noted that the plaintiffs had threatened legal action two and a half months before they actually launched proceedings. The Planning Tribunal found that the original consent was invalidly granted by reason of lack of authority, but noted that it had no jurisdiction to consider whether the consent should have been publicly notified. The Tribunal declined to make a declaration or issue an enforcement order in relation to the invalid consent until the parties had had time to consider the decision. The Council then proceeded to grant a new consent on a non-notified basis. Thus despite having shown that the original consent was invalidly granted, and having an arguable case that it should not have proceeded on a non-notified basis at any rate, the plaintiffs were unable to obtain relief. To add insult to injury, the Tribunal awarded costs against the objectors on the basis that they had succeeded only on a technicality and had failed to establish any of the substantive grounds of their case. The Planning Judge accepted that the proceedings were honestly brought, but was doubtful of the propriety of the proceedings, given the uncertainty as to whether some of the issues the plaintiffs sought to raise were within the jurisdiction of the Tribunal or could only be raised in the High Court.[223]

Not surprisingly, the non-notification issue is the topic of some debate at present. The Ministry for the Environment is conducting an investigation into the use of s 94 although it has not yet established its terms of reference. A coalition of national environmental organisations has proposed that the Act be amended to allow appeal rights against non-notification decisions, and three of the political parties contesting the 1996 elections have endorsed this recommendation in principle.[224] The creation of an appeal right would also be consistent with recent recommendations of the British Law Commission. In their report it is suggested that where a particular jurisdiction throws up a large number of judicial review cases, this is an indication that a right of appeal or other supervisory review is needed.[225] Similarly, it has been noted by academic writers that it is preferable for those cases which regularly give rise to factual issues to be determined initially by a tribunal whose decisions are then subject to review.[226] Furthermore, it has been argued that an initial appeal to a tribunal preserves the efficacy

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223 *Hunt v Auckland City Council and St James Group* A68/94, 5.

224 A recent survey entitled *Vote for the Environment* (Greenpeace, Environmental and Conservation Organisations, Federated Mountain Clubs, Friends of the Earth, Royal Forest and Bird Protection Society, and World Wildlife Fund, June 1996) shows that Labour, the Alliance and the Progressive Green Party support the enactment of an appeal right. National, New Zealand First and ACT were either undecided or not in favour of an appeal right.

225 Above n 60, para 2.23.

226 Above n 82, 15-087.

of judicial review by allowing the courts to focus on cases which concern serious errors of law.[227]

One final point should be noted in relation to review of the initial consent decision. Although in general this paper suggests that judicial review is inappropriate at this stage of review, it should be noted that the Court has shown a much more generous approach to questions of standing than the Planning Tribunal. The Court has shown much greater recognition of the role of public interest groups in protecting the correct application of the law. This may stem from the fact that one of the key purposes of judicial review is to ensure to ensure that decision makers exercise their powers lawfully. By contrast, in the context of the Planning Tribunal, the focus is on more on achieving a just result in the individual circumstances. It is submitted that it is seen as less important that someone be in a position to challenge the lawfulness of the decision. Nevertheless, one of the aims of the resource consent process is to allow public participation so as to ensure that the decision maker is fully informed. As noted above, it is therefore contradictory to exclude public interest groups who often have the relevant expertise to assist in making an accurate decision.

B Review of Planning Tribunal Decisions

Questions of standing aside, it does appear that appeal to the Planning Tribunal presents the preferable remedy against the decision of a consent authority. The question then arises as to whether there is a role for judicial review of the decision of the Planning Tribunal itself. The potential for such an application hinges on the difference between judicial review and the appeal process provided for under s 299 of the Act. As noted above, De Smith suggests that any ground of challenge available under review is also available on an appeal on a point of law. Indeed in some respects the two processes are very similar. Neither procedure is designed to consider disputed questions of fact, and the Court has been at pains to stress this point in both appeal and review actions. However it is in the appeal cases that the greatest reluctance to examine factual matters has been shown. The Court has stated that on appeal it may defer to the decision of the Planning Tribunal even where there is has no evidence to support it. By contrast, in *Worldwide Leisure*, it was found that on an application for judicial review the Court would intervene in these circumstances. Examination of the cases decided under the RMA demonstrate some further differences.

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227 Sir Harry Woolf "Judicial Review: A Possible Proposal for Reform" [1992] Public Law 221, 236. See also A W Bradley "The Council on Tribunals: time for a broader role?" [1991] Public Law 6.

A general comparison of the two procedures is complicated by the fact that the grounds of appeal under s 299 are somewhat unclear. Some of this confusion stems from the statement of the grounds of intervention in *Countdown Properties*. The first, third and fourth limbs of the test outlined in that case appear to state different parts of what would be viewed as the ground of illegality in a judicial review action. The second limb would appear to refer to the ground of unreasonableness. However no reference is made to intervention on the ground of procedural impropriety.

In terms of determining the application of the correct legal test, an analysis of cases such as *New Zealand Rail* suggests that the Court is reluctant on appeal to exercise its role of clarifying and developing the law, and ensuring the consistency of its application. An analysis of the appeal decisions suggests that there may be a tendency to focus on the substantive issues rather than on when the correct procedure has been observed. For example in *Hunt*, the High Court dismissed the argument that the Tribunal had failed to take into account the role of the appellants as private enforcers of a public right when making a costs award against them. Williams J agreed with the submission that there was a general public interest in ensuring that a territorial authority exercises its important administrative powers in a lawful way, but declined to set aside the costs award of the Tribunal.[228] The fact that a procedural error had in fact been established was also insufficient to set aside the order.

In a similar vein, it is interesting to note the recent decision in the *Manos* case holding that there should be no higher test such as immateriality beyond a reasonable doubt for assessing whether an error is immaterial. Again this demonstrates a focus on the substantive outcome rather than on the procedure followed. Lord Bingham has stated both in the case of *R v Chief Constable of the Thames Valley Police Force, ex p Cotton*[229] and extra-judicially[230] that the Court should be very slow to conclude that an error is immaterial in cases where natural justice has been denied. He gives six reasons for this point of view including the proposition that appearances are important, and that where a decision maker is under a duty to act fairly the subject of the decision has a right to be heard and rights are not lightly to be denied. While the decision in *Manos* concerned the taking into consideration of an irrelevant fact rather than a breach of natural justice, it still may be argued that the Court should require a higher test such as proof beyond a reasonable doubt. It appears therefore that judicial review might be more effective than appeal in ensuring that the correct legal test has been applied.

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228 Above n 88, 56.
229 [1990] IRLR 344, 352.
230 Above n 147, 72.

Judicial review may also be the only remedy available on the ground of procedural impropriety. An examination of the cases gives no clear indication whether this ground will be available on appeal under s 299. While the summary of the Court's grounds of intervention in *Countdown* does not make reference to procedural propriety, the Court did not instantly dismiss the appellants' arguments on this ground. It should be noted that there has not been much focus either on procedural propriety in the RMA judicial review cases. However it is clear that this ground would be available on a judicial review action.

One respect in which appeal might possibly provide a wider basis for review is where the decision maker is alleged to have acted unreasonably. It is clear from *Worldwide Leisure*, that on review the test is for unreasonableness in the public law sense of the phrase. However it has been noted in the appeal cases the position is less clear, with some dicta to suggest that ordinary reasonableness will suffice.

Finally, it is interesting to examine briefly the remedies available under the different procedures. It is clearly established that judicial review remedies are discretionary. However it appears that the Court also has the discretion to decline a remedy on appeal. In *Habgood* it was suggested that "as a matter of common sense" a decision should not be set aside where the error was immaterial, which suggests some element of discretion. The recent decision in *Manos* enhances that discretion by finding that materiality is a question of judgment rather than of proof to a standard. Another interesting point from *Habgood* is the statement by the Court that it should not exercise its power under the High Court rules to substitute its own decision for that of the Tribunal. Interestingly, this removes one of the distinctions between the remedies available on review and appeal. This distinction was identified by the Franks Committee as a reason for preferring appeal from decisions of an administrative tribunal.[231]

On balance, therefore, it appears that some differences can be detected in the role of the Court on review and appeal. In particular, it seems that the focus of appeal is more on the substantive outcome of decision than on the procedures followed. This is evidenced by the decisions relating to application of the correct legal test, and by the absence of any reference to procedural impropriety as a ground of intervention on appeal. The present approach to appeal appears to be fulfilling one of the functions of judicial scrutiny in terms of protecting the rights of the individual. However it does not do so well at fulfilling its role of protecting the public interest in the faithful and correct

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231 Above n 14, para 107.

application of the law. While judicial review is also concerned with protecting the rights of the individual, it can be argued that it places a greater emphasis on the process by which the decision is reached. It is submitted that in this respect, judicial review may be a preferable means of challenging a decision of the Planning Tribunal. There may yet be a role for judicial review of Tribunal decisions.

V CONCLUSION

It has been shown that judicial scrutiny has an important part to play in ensuring that the powers of consent authorities are exercised faithfully and correctly. It has also been seen that the courts have a role in developing and clarifying the tests to be applied by the authorities. For the most part, the role of judicial scrutiny under the RMA is carried out by the Planning Tribunal and the Court on appeal. The scope of judicial review is limited by s 296 of the Act, and to date it has not played a large role in the consent process. While a number of judicial review cases have been brought against non-notification decisions, these cases tend to demonstrate that review is not ideally suited to the scrutiny of initial decisions of consent authorities. This function is better carried out by an appeal to the Planning Tribunal, a body which has the jurisdiction and expertise to re-examine the facts of the case.

However there may be a role for judicial review of Planning Tribunal decisions themselves. It appears that on the Court's present interpretation, an appeal under s 299 does not include all the grounds available on an application for judicial review. In particular, the appeal decisions do not appear to provide much focus on the procedural aspects of Tribunal decisions. Nor does the Court appear to be fulfilling, on appeal, its role of clarifying and ensuring consistency in the legal tests to be applied under the Act. It is submitted, therefore, that in certain circumstances the Court should not exercise its discretion to deny relief on an application for review. Given the very significant impact of resource consent decisions, it is vital that correct procedures are followed and that a consistent approach to granting consents is developed. Judicial review is ideally suited to ensuring consistency of process. It appears there may be scope under the Act for it to fulfil this function.

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APPENDIX

3. Meaning of "effect"--
In this Act, unless the context otherwise requires, the term "effect" [] includes--
(a) Any positive or adverse effect; and
(b) Any temporary or permanent effect; and
(c) Any past, present, or future effect; and
(d) Any cumulative effect which arises over time or in combination with other effects--regardless of the scale, intensity, duration, or frequency of the effect, and also includes--
(e) Any potential effect of high probability; and
(f) Any potential effect of low probability which has a high potential impact.

5. Purpose--
(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while--
  (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
  (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
  (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

94. Applications Not Requiring Notification--
(1) An application for--
(a) A subdivision consent need not be notified in accordance with section 93, if the subdivision is a controlled activity:
(b) A [resource] consent need not be notified in accordance with section 93, if the activity to which the application relates is a controlled activity and the plan expressly permits consideration of the application without the need to obtain the written approval of affected persons:
(c) Any other resource consent that relates to a controlled activity need not be notified in accordance with section 93, if--
  (i) The activity to which the application relates is a controlled activity; and
  (ii) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.

[(1A) An application for a resource consent need not be notified in accordance with section 93 if--
(a) The activity to which the application relates is a discretionary activity over which the consent authority has restricted the exercise of its discretion; and
(b) The plan expressly permits consideration of the application without the need to obtain the written approval of affected persons.]

(2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and--
(a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and

(b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

(3) An application for a resource consent need not be notified in accordance with section 93, if the application is for a resource consent to do something that would otherwise contravene any of sections 12 (1), 13, 14 (1), or 15 (1) and--
(a) There is no relevant plan or proposed plan; and
(b) The consent authority is satisfied that the adverse effect on the environment of the activity for which the consent is sought will be minor; and
(c) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.

(4) In determining whether or not the adverse effect on the environment of any activity will be minor for the purposes of subsection (2) (a) or subsection (3) (b) a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection (2) (b) or subsection (3) (c).

[(5) Notwithstanding subsections (1) to (3), if a consent authority considers special circumstances exist in relation to any such application, it may require the application to be notified in accordance with section 93, even if a relevant plan expressly provides that it need not be so notified.]

96. Making of submissions--
(1) Any person may make a submission to a consent authority about an application for a resource consent that is notified in accordance with section 93.
...

120. Right to appeal--
(1) Any one or more of the following persons may appeal to the Planning Tribunal in accordance with section 121 against the whole or any part of a decision of a consent authority [, except a decision of the Minister of Conservation under section 119,] on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
(a) The applicant or consent holder:
(b) Any person who made a submission on the application or review of consent conditions
...

274. Representation at proceedings--
(1) In proceedings before the Planning Tribunal under this Act, the Minister, any local authority, any person having any interest in the proceedings greater than the public generally, and any party to the proceedings, may appear and may call evidence on any matter that should be taken into account in determining the proceedings.
(2) Where any person who is not a party to the proceedings before the Planning Tribunal under this Act wishes to appear, that person shall give notice to the Tribunal and every party not less than 10 working days before the commencement of the hearing.

296. No review of decisions unless right of appeal or reference to inquiry exercised.--

If there is a right to refer any matter for inquiry to the Planning Tribunal or to appeal to the Tribunal against a decision of a local authority, consent authority or any person under this Act or under any other Act or regulation--

(a) No application for review under Part I of the Judicature Amendment Act 1972 may be made; and

(b) No proceedings seeking a writ of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction in relation to that decision, may be heard by the High Court--

unless the right has been exercised by the applicant in the proceedings and the Tribunal has made a decision.

299. Appeal on a question of law--

(1) Any party to any proceedings before the Planning Tribunal under this Act, or another Act, or regulation, may appeal against the decision or report and recommendation of the Tribunal to the High Court on a point of law.

(2) Repealed.

(3) An appeal under this section shall be made in accordance with the High Court Rules except to any extent that those rules are inconsistent with sections 300 to 307.

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