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A CRITIQUE OF THE ENVIRONMENT COURT DECISION IN *SAVE THE POINT INC V WELLINGTON CITY COUNCIL*: HOW THEY MISSED THE POINT

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I INTRODUCTION

In October 2006 the Wellington Marine Conservation Trust ("the Trust") was granted resource consent to build and operate a Marine Education Centre ("the Centre") at Te Raekaihau Point on Wellington's south coast.[1] This decision was appealed to the Environment Court ("the Court"). The Save the Point group and four other parties appealed on several grounds stemming from the Resource Management Act 1991 ("the RMA"). The Court, by a majority of two to one, upheld the appeal.

Part II of this paper begins by presenting details of the Trust's proposal. It then outlines the relevant sections of the RMA and the main reasons for the Court's decision. This paper then argues in Parts III and IV that the Court's decision was incorrect for two reasons.

Part III argues that the Court incorrectly considered the RMA section 104 'actual or potential effects' of the proposal. The role and requirements of section 104 are examined. This is followed by a discussion of the process that the Court is required to follow in a section 104 inquiry. It is argued that by failing to consider all the economic benefits, and by conflating economic benefits and financial viability, the Court failed to follow the correct process. This resulted in a distorted analysis.

Part IV argues that the majority misunderstood section 6(a) of the RMA - the requirement to safeguard the coastal environment from 'inappropriate' development. The role of section 6(a) in the hierarchy of the RMA is examined. Then the reasoning of the majority and minority is presented. This is followed by an analysis of the section 6(a) threshold of preserving the environment from 'inappropriate' development. Finally, it is suggested that the majority's failure to find that the proposal was an appropriate development was based on errors in their consideration and application of section 6(a).

Part V considers the wider legal implications of this decision.

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[1] Decision Of Joint Hearings Commissioners, Wellington City Council: Service Request 145743 and Wellington Regional Council: WGN060300, 26 October 2006, www.wellington.govt.nz (last accessed 29 August 2008)

II FACTUAL BACKGROUND

A The Proposal

Between 1996 and 2003 around 160,000 people visited the Island Bay Marine Education Centre at its various temporary locations on Wellington's south coast.[2] Dr Victor Anderlini and Ms Judith Hutt established this Centre. In the late 1990's they established the Trust that eventually proposed the "permanent, purpose built home"[3] for the Centre on the City Council owned land at Te Raekaihau Point ("the Point").

The Point is at the western entrance to Lyall Bay.[4] It faces south, and as its loose translation – *the headland that eats the wind* – suggests, it is exposed to the notorious weather systems that advance from the south. The only development of the Point is a car park that provides access for the many divers, swimmers and visitors during the summer months.[5] At the western end of the car park, at Princess Bay, there are public toilets and changing rooms.

The proposal was for a three level building 22 metres in height.[6] The lowest level was to be below the level of the road and would contain large aquarium tanks and activity rooms. The middle level was to contain a reception, shop and café.[7] The top level was set aside for administration and research purposes.[8] Around 1.3 hectares would be developed or modified in some way. This total area would occupy the existing car park and would extend beyond it. The proposal also included the development of a new 92-space car park.[9] The Centre would operate for 11 hours daily from November to March, and 8 hours daily for the rest of the year. Seawater for the aquarium tanks would be piped in from Princess Bay and out to Lyall Bay through submerged and buried pipes at a rate of between $40m^3$ and $90m^3$ per hour.[10]

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[2] *Save the Point Inc v Wellington City Council* (20 September 2007) EC WN W082/2007, para 3.
[3] Ibid, para 4.
[4] See Appendix 1 – Aerial View of South Coast.
[5] See Appendix 2 – Aerial Photograph of Te Raekaihau Point.
[6] See Appendix 3 – Artist's Impressions of Proposed Centre.
[7] *Save the Point,* above n 2, para 4. The café would seat up to 155 people, with 120 indoors and 35 on the terrace.
[8] See Appendix 4 – View of Split Levels.
[9] *Save the Point,* above n 2, para 5. See Appendix 5 – Proposed Landscape Plan.
[10] Ibid, para 6.

The Wellington City District Plan places the Point in an Open Space B zone.[11] Rule 17.3.2 of the Plan states, "any construction, alteration of and additions to buildings and structures in Open Space B...not specifically provided for as Permitted Activities are Discretionary Activities". As the construction was not permitted as of right it was necessary for the Trust to acquire a resource consent.[12] The consent was given, and then became the subject of the appeal to the Environment Court by Save the Point Inc and four other parties.[13] The appeal was based on several grounds including natural character, ecology, open space and amenity values, traffic and parking and economic benefits.

B The Environment Court Decision

In their 84-page decision the Court traversed the many relevant sections of the RMA. This paper will concentrate its focus on three sections in particular. First, section 5 and its statement of the purpose of the RMA. Second, section 104(a) and its requirements. Finally, section 6(a) and its requirements.

Section 5 in Part 2 "is the most critical part of the legislation which governs both its operation and interpretation".[14] It states:

> (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...
> >
> > (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

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[11] Wellington City District Plan, Volume 3: Maps, Map 4 *Owhiro Bay, Island Bay, Lyall Bay*, 2006.
[12] Resource Management Act 1991, s 77B (4)(a).
[13] Chris Webster; Group Against Development On Te Raekaihau Point; Mrs Trevelyan and Mr Laurenson; and Action for the Environment Inc.
[14] Derek Nolan *Environmental and Resource Management Law* (3ed, LexisNexis, Wellington, 2005), 96.

This is the paramount purpose of the RMA. This overriding, paramount purpose is what all the other RMA considerations must be linked back to.[15]

To inform the decision of whether a discretionary proposal does indeed promote sustainable management, a Court assesses the proposal under sections 6-8 in Part 2, and section 104 in Part 6, of the RMA.[16]

Section 104(1) relates to consideration of applications:

> When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 have regard to -
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of -
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

In considering paragraph (a) the Court held that the Centre would have positive education, advocacy, and tourism effects.[17] However there would also be significant adverse effects on: the natural character;[18] the special amenity value of the landscape;[19] the southern, eastern and western views across the site;[20] and open space values "both now and in the future".[21]

In considering paragraph (b) the Court held that the proposal: would be inconsistent with certain provisions of the New Zealand Coastal Policy Statement;[22]

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[15] Barker J used the word 'paramount' in *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 632 (HC).
[16] *Save the Point*, above n 2, para 27. See also para 267.
[17] Ibid, paras 34-37.
[18] Ibid, para 63-64.
[19] Ibid, para 81.
[20] Ibid, para 100.
[21] Ibid, para 105.
[22] Ibid, para 171.

was in conflict with various policies in the Regional Policy Statement;[23] and would not accord with many of the objectives and policies of the District Plan.[24]

Finally, under paragraph (c) the court dealt with the South Coast Management Plan and noted that "[a]s a non-statutory management plan, with no appeal rights to the Environment Court, we do not give [it] great weight".[25]

Section 6 relates to matters of national importance:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> > (a) The preservation of the natural character of the coastal environment... and the protection of [it] from inappropriate subdivision, use, and development.

The Court was divided in applying this section. Judge Thompson in the minority concluded that the appeals should be declined. In his view, despite the adverse effects, the proposal would be "an entirely *appropriate* use of the site, adding an entirely complementary and interesting asset to the south coastline",[26] which would allow – as stipulated in section 5 – the community to provide for their social, economic and cultural well-being. It could do this without irreversible harm, "while reasonably avoiding, remedying and mitigating adverse effects to the point where they will not be more than minor".[27]

The majority, comprised of two Environment Commissioners, upheld the appeal. In their view the proposal was contrary to section 6(a) in that it was an inappropriate use and development of the coastal environment.[28] After adding this to their conclusions under section 104 the Commissioners noted that, "[a]ll factors, however raised under s104 or Part 2 of the Act, go to informing the weighing and the

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[23] Ibid, para 185.
[24] Ibid, para 207.
[25] Ibid, para 225.
[26] Ibid, para 283 (emphasis in the original).
[27] Ibid, para 292.
[28] Ibid, para 272.

decision required under s5, which embodies the purpose of the Act".[29] The Commissioners concluded that, "the proposal would not promote the sustainable management of natural and physical resources".[30]

This paper will now present the two major ways in which the Court's decision was incorrect. It will first focus on the mistakes made by the Court in its consideration of section 104. This will be followed by an examination of the majority's incorrect application of section 6(a)

III SECTION 104 - POSITIVE EFFECTS

This section argues that the Court made a faulty appraisal of the proposal's effects. This was an error in law and led to an incorrect conclusion being drawn.

A The Applicable Law

1 The Resource Management Act 1991

The role of section 104(1)(a) is to inform the decision made by the Court as to whether a proposal achieves the paramount purpose of sustainable management. It states that, when considering an application for a resource consent, the authority must have regard to "any actual and potential *effects* on the environment of allowing the activity".[31]

The definition of 'effect' is set out in section 3 of the RMA. It states that:

> unless the context otherwise requires the word 'effect' includes:
>
> (a) Any positive or adverse effect; and
> (b) Any temporary or permanent effect; and
> (c) Any past, present, or future effect; and

[29] Ibid, para 267.
[30] Ibid, para 273.
[31] (Emphasis added).

> (d) Any cumulative effect which arises over time or in combination with other effects

Because section 3 says 'unless the context otherwise requires', Tipping J in *Dye v Auckland Regional Council* held that Parliament had "implicitly abandoned the s 3 definition",[32] through the use of the words 'actual or potential effects' in section 104. However, he concluded that the terminology used was "inherently very wide and capable of capturing some, if not all, of the subtleties of the s 3 definition".[33] The High Court in *Whangamata Marina Society Inc v Attorney-General* confirmed recently that under section 104 "an effect can be positive or adverse".[34]

2 The process to follow

As noted in *Whangamata Marina Society Inc v Attorney-General:*[35]

> The RMA is premised upon consent authorities identifying first whether there are any significant actual or potential effects on the environment of allowing a proposed activity. Secondly, the consideration moves on to an evaluation of those effects; to examine whether or not they warrant rejecting resource consent or allowing the consent.

So, section 104 requires the Environment Court to first identify any positive or adverse effects on the environment that will result from the proposal. Then, they evaluate those effects. Evaluating them involves examining them in the light of the part 2 'Purpose and principles' and the relevant statutory instruments set out in section 104(1)(b).[36]

Thus, because section 104 informs the decision under section 5, any mistake made in the consideration of effects has serious repercussions. Because section 5

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[32] *Dye v Auckland Regional Council* [2002] 1 NZLR 337, 349 (CA) Tipping J.
[33] Ibid.
[34] *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252, 261 (HC) Fogarty J. For examples of positive benefits being considered under section 104 see *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419; and *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433.
[35] *Whangamata Marina Society*, above n 34, 261 Fogarty J.
[36] Ibid, 262 Fogarty J.

requires an "overall broad judgment"[37] a decision maker must be accurate in the weights they are putting on the 'for and against' scales. An incorrect consideration of the positive effects can result in a faulty finding. As the Environment Court in *Affco New Zealand v The Far North District Council* warned:[38]

> [u]nless all the effects, positive and negative, of a proposal are assessed together, the consideration of them required to make the ultimate judgment whether the consent should be granted or refused may be incomplete, and the balancing may be distorted.

In the present case the Court identified education,[39] and economic benefits[40] as positive effects in their analysis. In regards to educational benefits they concluded that, "we think the argument that strong positive education and advocacy benefits will arise from this kind of facility is unassailable".[41] However, it is the Court's failure to identify and correctly evaluate the scope of the economic benefits that demands further attention.

B Economic Benefits

1 A decision-maker must consider positive economic effects

As shown above, the positive effects of a proposal on the environment are a matter that the Court is required to have regard to under section 104(a) of the RMA. The term 'environment' is defined in section 2 of the RMA as including:[42]

> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, *economic*, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

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[37] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, 94.
[38] *Affco New Zealand v The Far North District Council* [1994] NZRMA 224, 233.
[39] *Save the Point,* above n 2, paras 28-34.
[40] Ibid, paras 35 and 268.
[41] Ibid, para 34.
[42] (Emphasis added).

Accordingly, the economic conditions that affect people and communities are relevant in a section 104 consideration. In other words, a positive effect includes economic benefits.[43] The Planning Tribunal in *Imrie Family Trust v Whangarei District Council* declared "we need to consider the economic effects of the proposal on the environment…to the extent that they affect the community at large".[44]

This view is strengthened further by reference to section 5(2) of the RMA. It states that resources should be managed in a way "which enable people and communities to provide for their social, *economic*, and cultural well-being and for their health and safety".[45] Thus, the overriding purpose of the RMA acknowledges the role that economic benefits play in decision-making. This paper will now demonstrate how the Court erred in its consideration of section 104.

2 Evidence called on positive effects was not considered

The first part of the section 104 process is identification of effects. When undertaking this step the Court identified and considered the benefits resulting from tourism.[46] The Court was presented with evidence that initially the Centre would be likely to generate around 244,000 visitors per year. This would grow to 257,000 over four years.[47] The Chief Executive of Positively Wellington Tourism, a charitable trust that promotes Wellington as a tourist destination, also gave evidence. He stated that the Centre was a "commissionable attraction — ie one that travel wholesalers would include in travel and visitor packages".[48] He added that the Centre would add another strong asset to the Wellington tourism network. However, the economic benefits from tourism were only one facet of the evidence presented by the Trust. They had also presented evidence that the Centre would produce numerous other economic benefits.

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[43] See *St Lukes Group Limited v North Shore City Council* (20 April 2001) EC AK A41/2001, para 39; and *Marborough Ridge Ltd v Marlborough District Council* (16 October 1997) EC BLE C111/1997.
[44] *Imrie Family Trust v Whangarei District Council* [1994] NZRMA 453, 463.
[45] (Emphasis added).
[46] *Save the Point,* above n 2, paras 35-37.
[47] Ibid, para 35.
[48] Ibid.

The trust had written evidence provided by Richard Miller from McDermott Miller.[49] Part of this evidence stated that:[50]

> regional economic wellbeing is also enhanced by persuading Wellington residents to remain in the region and spend their money on leisure "at home", rather than go outside the region and spend money in other places ("leakage" to other centres).

So, not only would the Centre bring in tourism money from outside the region, it would also encourage Wellingtonians to spend their money locally.

There would also be economic benefits that would accrue from the construction of the centre. The cost of construction of the Centre was estimated at $20 million. This would have a positive economic impact on both New Zealand's GDP (in terms of value added by labour and capital), and the regional/inter-regional economy.[51] Thus, this positive impact enables communities, both local and national, to provide for their economic well-being.

The expert report obtained by the Trust also indicated that employment in Wellington would increase by around the equivalent of 40 full time jobs.[52] This is an effect that directly enables people to provide for their economic well-being. This increased employment - and the inevitable increased spending by those people - creates a flow-on effect which would positively effect local communities. The ultimate result is communities who are better off both socially and economically. The report concluded that the Centre "will make a contribution to economic wellbeing in Wellington that is positive and significant", and that at a conservative estimate it would add economically to the region more that triple that of the Wellington Zoo.[53]

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[49] A "commercially independent Wellington based strategic planing consultancy, which specialises in developing strategies, market analysis and development planning". From Statement of Evidence of Richard Miller, McDermott Miller Limited, 11 May 2007, para 1; The methodology used was "research-based analyses, using best available data and market intelligence about likely performance of new attractions in Wellington…McDermott Miller projected visitor numbers to [the Centre] using the widely-applied 'penetration rate' method". From Statement of Evidence in reply of Richard Miller, 15 June 2007, paras 6-7.

[50] Statement of Evidence by Richard Miller, above n 46, para 28.

[51] Ibid, para 85.

[52] Ibid, para 89.

[53] Ibid, paras 90-91.

The appellants called no expert evidence to rebut the conclusions reached by Mr Miller.

The Environment Court has on many occasions identified and taken into account positive economic effects such as increased employment.[54] Nolan notes that where a "resource consent proposal could provide positive economic benefits to the community, for example, by providing employment...this may represent a positive effect on the environment which could appropriately be considered under ss 5(2) and 104(1)(a)".[55]

In the initial Council decision granting resource consent to the Proposal, two more economic benefits were identified. The joint Commissioners in that hearing identified the benefits to marine ecology and the fishing industry through enhanced knowledge of the marine environment. This would enable better management of marine resources and thus increase the sustainability of such enterprises.[56] They also identified the benefit to those providing recreational services in the marine environment, for example the diving industry. The implication was that the greater knowledge and appreciation of the marine environment could increase demand for those services and this was "an essentially local benefit".[57]

The Court failed to identify these further economic benefits in their section 104(a) considerations. As shown by the analysis of the RMA and relevant case law, the Environment Court is obliged to have regard to any positive effect on the environment of allowing the activity. The environment includes the economic conditions, which affect people and communities. The economic benefits identified by Richard Miller and the joint Commissioners were effects on the environment that would have had widespread positive ramifications for the Wellington region, both for people (employment opportunities), and communities (increased spending in the region). By concentrating on the tourism benefits alone they failed to have regard to

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[54] For example see *South Kaipara Harbour Environment Trust v Auckland Regional Council* (7 April 2006) EC AK 045/2006, paras 28 and 128; *Dunedin Ratepayers & Householders Association Inc v Dunedin City Council* (31 March 2004) EC CHCH 39/2004, para 57; and *Nelson Fisheries Ltd v Marlborough District Council* [1995] 4 NZPTD 607.
[55] Nolan, above n 14, 109.
[56] Decision Of Joint Hearings Commissioners, above n 1, para 150.
[57] Ibid.

significant 'actual and potential' effects as required by law.

The Court's failure to identify these positive effects in their section 104(a) analysis was an error in law and, by itself, undermines their final decision. However, this was not the only serious error. The Court made an additional mistake by attempting to conflate the issue of the Centre's 'economic benefits' with the issue of the Centre's 'financial viability'.

3 *'Economic benefits' and 'financial viability' were wrongly conflated*

Save The Point Inc made a pre-trial application for the discovery and production of documents that related to the "projected financial arrangements for the construction and establishment of the [Centre]".[58] Save The Point wanted the documents so they could assess the Centre's financial viability against the expected arguments related to positive benefits.[59] Environment Judge Thompson, sitting in Chambers, observed that:[60]

> strictly, the financial viability of a proposed activity is generally a matter for its proposers to decide. In general terms what the Court has to resolve is whether the proposal meets the s 5 test of sustainable management of natural and physical resources; an issue usually resolved by an examination of its effects on the environment. However the dividing line between that and argued positive effects on the social, cultural and economic well being of the community is a fine one and difficult to decide in advance.

This was a precursor for the conflation by the Court of economic benefits and financial viability. This paper argues that the "dividing line" between financial viability and positive effects was incorrectly drawn.

'Financial viability' means the "economic practicability"[61] of a proposal. As Salmon J warned in an appeal from the Environment Court, "Judges must be wary of

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[58] *Save the Point Inc v Wellington City Council* (30 April 2007) EC WN W027/2007 (Application for discovery), para 1.
[59] Ibid, para 2.
[60] Ibid, para 6.
[61] *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70, 89 (HC) Greig J.

getting into issues of financial viability".[62] The Court, in their discussion of the economic benefits of tourism, stated that it was an issue "closely linked with that of financial viability".[63] Later on, in their consideration under section 104(c) of other relevant matters, they also discussed financial viability. They first mention that financial viability "might come within the *economic wellbeing* rubric of s5".[64] The Court then noted that there had been evidence that the proposal would bring employment opportunities, and increased visitor spending into Wellington generally. They continued:[65]

> That may well be so – but we have no better access to a crystal ball than anyone else. Whether the proposal can be financially viable depends both on factors that might be ascertainable in advance – eg construction costs, and those than cannot be quantified to more than a broad band of expectation– eg admissions revenue. In any event, it is not a function of this Court to sit in judgment on issues of commercial risk or prudence, or to decide whether a commercially correct choice of available alternatives has been made.

To reinforce this point the Court cited *Todd Energy Ltd v Taranaki Regional Council*,[66] and *New Zealand Rail v Marlborough District Council*.[67]

Todd Energy involved the application by Fonterra for land use and discharge consents, which would have enabled it to build an energy centre for coal and gas energy generation. The Environment Court in that case noted that it should start from the position that there was "an apparently viable proposal *on the table* and it is the business of this Court to decide on disputes about the effects on the environment of such proposals".[68] In relation to the commercial wisdom of the decision taken by Fonterra to build an energy centre the Court declared that it was not for the Court to second guess management strategies, "[i]t is only when, and if, the implementation of that strategy produces effects on the environment that this Court has a role".[69]

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[62] *Smith Chilcott Ltd v Martinez and Miguel* [2001] NZRMA 108, 117.
[63] *Save the Point*, above n 2, para 37.
[64] Ibid, para 220 (emphasis in the original).
[65] Ibid.
[66] *Todd Energy Ltd v Taranaki Regional Council* (7 December 2005) EC NWP W101/2005.
[67] *New Zealand Rail*, above n 61, Greig J.
[68] *Todd Energy*, above n 66, para 17 (emphasis in the original).
[69] Ibid.

In *New Zealand Rail* the High Court considered an appeal from the Planning Tribunal. It was argued that Port Marlborough had underestimated the costs of a new port, which meant that New Zealand Rail, as the predominant and principle user of the port, would bear the brunt of those costs.[70] This in turn put the financial viability of the proposal in doubt. New Zealand Rail therefore contended that the Planning Tribunal had failed to take into account the financial viability of the proposed port when they granted consent.[71] Greig J stated: [72]

> Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of the promotion of sustainable management…[Economic considerations] would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

Greig J went on to hold that the Tribunal had not been dismissive of the economic evidence, but had instead considered all the evidence and then dismissed the contentions and opinions of the expert witness as unconvincing in their probability.[73] Thus, economic questions had been taken into account, and the resulting conclusion the Tribunal came to was a weighing decision it was entitled to make as a matter of fact.[74]

The preceding cases demonstrate the error made by the Environment Court in the present case. Correctly they held that financial viability was not their concern. As shown in *Todd* financial viability is only of concern where it has an effect on the environment.[75] However, as explained in *New Zealand Rail*, although questions of financial viability are best left in the boardroom, this does not relieve the Court of their obligation to consider economic benefits. They are separate considerations.

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[70] *New Zealand Rail,* above n 61, 86 Greig J.
[71] Ibid, 87 Greig J.
[72] Ibid, 88 Greig J.
[73] Ibid.
[74] Ibid.
[75] *Todd Energy*, above n 66, para 17.

Economic considerations must be taken into account and weighed against the Part 2 criteria. Thus, the Environment Court in the present case conflated looking into "the inner workings of private decisions"[76] with the required consideration of the economic benefits. In other words, they improperly mixed something they were not required to assess, with something they were required to "have regard to".[77]

In *Todd* the Environment Court realised that commercial viability was not to be equated with economic wellbeing.[78] However, the Court there followed the correct process. In relation to adverse effects the Court started with the proposition that:[79]

> we need to ask whether there is any evidence before us that there will be a measurable adverse impact on the ability of people or communities to provide for their economic wellbeing by the operation of the dual fuel plant, regardless of what would happen to the existing plant.

The Court concluded that there was no evidence that the proposal was likely to affect the economic wellbeing of groups of people (for example, the workforce) or a community.[80] Thus, the correct process was adhered to. Although acknowledging that there was financial viability issues, that did not excuse it from addressing the issue of economic effects. The economic affect question must be asked regardless of, and separately from, any financial viability issues. Therefore, although it may be convenient to sweep economic questions under the financial viability carpet, that is not how the legislation has been drafted, nor does the case law support that approach.

4 Conclusion

The Court in the present case did not follow the process they were required to follow under section 104(a). First they failed to identify all the economic benefits of the proposal. Second, they tried to conflate the issue of financial viability with the consideration of economic benefits. These errors in law led inevitably to the distorted weighing exercise warned of in *Affco New Zealand v The Far North District*

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[76] This is how financial viability was described in *Todd Energy*, above n 66, para 19.
[77] Resource Management Act 1991, s 104.
[78] *Todd Energy*, above n 66, para 23.
[79] Ibid.
[80] Ibid.

Council.[81] This paper contends that any decision based on such fundamental errors is inherently flawed.

The Court was united in its treatment of section 104. However, there was disagreement on the issue of whether the proposal should be regarded as inappropriate use and development of the coastal environment. This section 6(a) consideration forms the basis of the next part of this paper.

IV SECTION 6(a): INAPPROPRIATE DEVELOPMENT

In this part of the paper it is argued that the majority misunderstood the section 6(a) threshold of preserving the environment from 'inappropriate' development.

A The Applicable Law

Section 6 deals with 'matters of national importance'. It states:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> > (a) The preservation of the natural character of the coastal environment… and the protection of [it] from inappropriate subdivision, use, and development.

The fact that the legislature has labelled the matter as one of national importance and required decision makers to 'recognise and provide for' it, provides evidence of the weight attached to this factor.[82] However, as can be seen from the phrase 'in achieving the purpose of this Act', section 6 is subordinate to the overarching goal under section 5 of promoting sustainable management of natural and physical resources.[83] Thus, section 6(a) does not "create a veto over an application being considered under section 5, but merely inform[s] the essential decision making

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[81] *Affco New Zealand*, above n 38, 233.
[82] Nolan, above n 14, 116.
[83] *Auckland Volcanic Cones Society Inc v Transit New Zealand* (31 March 2003) HC AK AP123-SW02, para 38 Smellie J for the Court.

process required under section 5".[84] This was also the conclusion Greig J came to in *New Zealand Rail Ltd v Marlborough District Council* where he stated:[85]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose.

Section 6(a) refers to preserving and protecting the coastal environment from 'inappropriate' development. The application of this word was the cause of the division in the Environment Court. This paper will now set out the reasoning of both the majority and minority

B How the Court Applied Section 6(a)

1 The majority

The majority found that the proposal was an inappropriate development. To reach this conclusion they went through each of the Trust's arguments on why the proposal would be appropriate and rebutted them.

The Trust argued that development was appropriate because the natural character of the coastal environment was already compromised by the road, car park, and urban context. The Court held that this argument was overstated and the site has significant natural character values that had not been significantly diminished.[86]

The Trust also argued that development was appropriate because the primary purpose of the Centre was education, and that purpose was best served by being located next to the ocean to provide an educational connection with it. The majority

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[84] *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* (17 June 2003) EC CHCH C179/2003, para 47. See also *Trio Holdings v Marlborough District Council* [1997] NZRMA 97; and *Southland District Council v Southland Regional Council* [1997] 2 NZED 322.
[85] *New Zealand Rail*, above n 61, 84 Greig J.
[86] *Save the Point*, above n 2, para 233.

was not convinced on this point and thought that as education was not the Centre's sole function, the proposal was inappropriate.[87]

Another argument put to the Court was that the Centre was appropriate because the adverse effects on the local environment were outweighed by the benefits of marine education. The majority "[did] not agree in the circumstances of this case, particularly considering the proposed development and use of the site encompasses more than the marine education purpose".[88] They also noted the inconsistency of having a complex that has adverse effects on coastal environment to educate people on the preservation of marine ecology.[89]

The Trust also argued that the design of the building was unobtrusive. The majority disagreed and found that the design was obtrusive and that the Centre would dominate the Point and views from and through the Point. They held that this was "quite inappropriate".[90]

The majority concluded that, "we do not accept that the development and use proposed is appropriate on this site".[91]

As noted above, the section 6 consideration merely informs the decision to be made under section 5. That is, the overriding goal of promoting sustainable management. The Court acknowledged this and noted "[t]he hierarchy of matters…in Part 2 also inform our decision. The proposal is contrary to s 6(a) in being an inappropriate use and development of this part of the coastal environment".[92] In the majority's final decision under section 5 they held that the proposal would not achieve the goal of promoting the sustainable management of natural and physical resources.[93]

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[87] Ibid, para 237.
[88] Ibid, para 246.
[89] Ibid, para 247.
[90] Ibid, para 240. See *Arrigato Investments Ltd v Rodney District Council* (15 October 1999) EC AK A115/99, para 49 for discussion on subjectivity of these types of assessments. "Such responses are, to some degree, subjective and any subjective judgment is based on many varying factors. This fact simply reflects the old adage…that 'beauty is in the eye of the beholder'".
[91] Ibid, para 255.
[92] Ibid, para 272.
[93] Ibid, para 273.

2 The minority

Thompson J in the minority stated that regardless of what values are assigned to the Point "what needs to be resolved is whether what is proposed here is in any event an appropriate use and development on this piece of the coastline".[94] The Judge was pointing out that the matter of national importance set out in section 6(a), 'the preservation of the natural character of the coastal environment', is qualified by the requirement that use and development be 'inappropriate'.

This was also the opinion of the Environment Court in *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* where the Court stated, "we have concluded that the preservation envisaged in the first part of section 6(a) is subject to the qualification as to inappropriate development in the latter part of that subsection".[95] Nolan explains that the Explanatory Note to the Resource Management Bill 1989 shows that the intention behind changing the word 'unnecessary' to 'inappropriate':[96]

> was that particular recognition still be given to the importance of maintaining the natural character of the coastal environment, while not precluding its appropriate use and development...If overall it were to be considered an appropriate form of development, then it was not considered essential (under s 6) to preserve or protect the natural character of the coastal environment from it. The two could potentially sit comfortably together.

Thompson J concluded that the proposal was appropriate. He believed that although the Centre would effect and alter the natural character of the Point, "it nevertheless will not be *inappropriate*. In fact, in my view, it would be an entirely *appropriate* use of the site, adding an entirely complementary and interesting asset to the south coastline".[97] The Department of Conservation made a similar submission supporting the proposal. In its view despite the effects on the coastal environment "the benefits to be gained from the Centre's focus on marine education and marine

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[94] Ibid, para 277.
[95] *Pigeon Bay Aquaculture*, above n 84, para 41.
[96] Nolan, above n 14, 321.
[97] *Save the Point*, above n 2, para 283 (emphasis in the original).

advocacy provide exceptional circumstances in which it can be considered an appropriate development within the coastal environment".[98]

Thus, the key question in a section 6(a) inquiry is whether the proposal is 'inappropriate'. To determine the accuracy of the divergent views between the majority and the minority it is necessary to further analyse the 'inappropriate' threshold.

C The 'Inappropriate' Threshold

1 Interpretation

The High Court considered the term 'inappropriate' in *NZ Rail Ltd v Marlborough District Council*.[99] In his oft-quoted judgment Greig J compared the term 'inappropriate' to the former adjective 'unnecessary'.[100] He felt the former term had a wider connotation than the later. He stated:[101]

> 'Inappropriate' has a wider connotation in the sense that in the overall scale there is likely to be a broader range of things, including developments which can be said to be inappropriate, compared to those which are said to be reasonably necessary. It is, however, a question of inappropriateness to be decided on a case by case basis in the circumstances of the particular case. It is 'inappropriate' from the point of view of the preservation of the natural character in order to achieve the promotion of sustainable management as a matter of national importance...It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.

Greig J went on to say that the incorrect method to use when applying the Act was to put the absolute preservation of natural character at the forefront and to try to

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[98] Ibid, para 9.
[99] *New Zealand Rail*, above n 61, Greig J.
[100] Ibid, 85 Greig J.
[101] Ibid, 85-86 Greig J.

achieve that at the expense of everything else. He stated conclusively, "[t]hat is not the wording of the Act or its intention".[102]

Thus, as Nolan observes, while the term 'inappropriate' has an element of subjectivity it "must be considered in its context of the preservation of the natural character of the coastal environment [and as part of achieving the overall statutory purpose]".[103] This contextual consideration is what the majority failed to do.

2 How section 6(a) should have been applied

As noted above, the Trust argued that the Centre was appropriate at the Point because the primary purpose of the Centre was education, and that purpose was best served by being located next to the ocean to provide an educational connection with it. In *Meridian Energy Ltd v Wellington City Council*,[104] Meridian had an analogous argument. They asserted that because the proposed site had ideal characteristics for a wind farm it was appropriate, notwithstanding the adverse effects on the natural character of the coastal environment. The Environment Court unanimously held that a wind farm was an appropriate development in the coastal environment. To reach this conclusion the Court traversed the specific advantages of the proposed site. They identified the ideal wind speed at the site and its proximity to Wellington as tipping the scales in favour of appropriateness. So, despite the obvious damage to natural character, the site specific benefits at that particular location made the development appropriate. The Court concluded:[105]

> In our view such evidence points to the fact that the natural character of the coastal environment and the preservation of the outstanding landscape are not to be preserved at the cost of what is an appropriate development in this location. We conclude that the appropriateness of the overall site must in this instance take precedence over the preservation of the natural character of the coastal environment and an outstanding landscape.

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[102] Ibid, 86 Greig J. See also *Golden Bay Farmers and Ors v Tasman District Council* [730] 6 NZED 399 where the Court said "Just because an area contains a natural character worth preserving does not mean the development is automatically inappropriate".
[103] Nolan , above n 14, 119 and 122.
[104] *Meridian Energy Ltd v Wellington City Council* (14 May 2007) EC WN W031/07, para 452.
[105] Ibid.

Thus, in both *Meridian Energy* and the present case there was a powerful and logical connection between the purpose of the proposal and the natural characteristics of the proposed site.[106] This was the basis of the Trust's argument.

The majority in the present case was not convinced on this point and thought that as the aquarium part of the Centre was "an inward looking operation…[it has] little connection to the natural values of Te Raekaihau Point".[107] They also stated "[w]e were told the primary purpose of the Centre is, as its name indicates, education. However, that is not its sole function."[108] To support this they noted that the financial viability of the Centre required getting people to make repeat visits to the Centre.[109] Also, the majority pointed to the proposed café, and it's hosting of events unrelated to marine education as evidence that education was not the sole function.[110]

There are flaws in the majority's reasoning that demands attention. First, people can gain further educational benefits from repeat visits. Second, even if the centre has other purposes, it does not mean education is not the *primary* function. Third, it may well be the case that education is not its *sole* function, that however should not be the focus of the Courts inquiry. The majority's preoccupation with the proposed cafe[111] appears to lead them away from the task of applying 'inappropriate', "from the point of view of the preservation of the natural character in order to achieve the promotion of sustainable management as a matter of national importance".[112] In other words, the majority's focus should have been on the relationship between section 6(a) and section 5. Thus, the question should have been, 'is the Centre appropriate because, located at *this site*, it preserves the natural character of this environment relative to the promotion of sustainable management which will be achieved by its educational purpose?'. The answer to that question is obviously for the Court to decide. However, if the question is not asked, it cannot be answered.

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[106] Statement of Evidence of Michael Lawrence Steven, para 122.
[107] *Save the Point*, above n 2, para 236.
[108] Ibid, para 237.
[109] Ibid.
[110] Ibid.
[111] See also paras 246, 265, 268, 272.
[112] *New Zealand Rail*, above n 61, 85-86 Greig J.

Another argument put to the Court was that the adverse effects on the local environment were outweighed by the benefits of marine education. The majority "[did] not agree in the circumstances of this case, particularly considering the proposed development and use of the site encompasses more than the marine education purpose".[113] They also commented on the inconsistency of having a complex that has adverse effects on coastal environment to educate people on the preservation of marine ecology.[114]

Here again the majority's focus on the subsidiary purposes of the Centre causes problems. The proposed development may encompass more purposes than just marine education. However, this is not determinative of inappropriateness. The same criticisms can be levelled at this line of reasoning as were used in the preceding paragraphs. That is, that incorrect questions are being asked. In *Meridian Energy Ltd v Wellington City Council*, the Court noted that part of the weighing exercise for the appropriateness of a wind farm would turn on the fact that it enables "the generation of electricity from a perpetually renewable source which emits, effectively, no greenhouse gases".[115] Accordingly, the question in the present case should be 'is the Centre appropriate because its educational benefits achieve the promotion of sustainable management despite the adverse effects to the natural character?'. Part of promoting sustainable management is "[s]ustaining the potential of natural and physical resources…to meet the reasonably foreseeable needs of future generations".[116] The educational function of the Centre was directly aimed at marine conservation, thus empowering the community to preserve the local marine environment for future generations. To determine inappropriateness the majority should have focused on the benefits of marine education and the language of section 5. Instead their focus was – incorrectly – on the subsidiary purposes of the Centre.

The majority's concern about the apparent inconsistency of an environmental education facility causing adverse effects to the environment can be countered. An analogy with an army can be drawn to demonstrate how the proposed Centre's effects are not incongruous or 'inappropriate' in terms of the RMA. The position in modern

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[113] *Save the Point*, above n 2, para 246.
[114] Ibid, para 247.
[115] *Meridian Energy*, above n 104, para 450.
[116] Resource Management Act 1991, s 5(2)(a).

New Zealand society is that war, and the use of force, is inherently bad. However, we have a large force of soldiers and weapons to dissuade other people from attacking us, to maintain the peace, and to help worthy causes. So, we promote an end that we value highly through a method that is inherently in conflict with it. That is similar to why we have an aquarium on the coast (something the majority obviously believe is inherently bad). That is, to dissuade people from degrading the environment and to promote sustainability, by educating people in the most conducive environment to that education.[117] As the Trust's Deed points out, their aim is to "stimulate interest in, increase knowledge of and promote guardianship of local, national, and global marine environments".[118]

So, just as it may be counter-intuitive to promote peace with an armed force, it may also be counter-intuitive to promote environmental protection with a development in the coastal environment. But in this case it is *appropriate*. Again remembering, "[i]t is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management".[119] As the Court itself admitted:[120]

> There was a high measure of agreement that the education of children and adults alike about coastal and marine ecology, its vulnerability to human-generated influences, and the degradation those influences have already brought about, is an important component of the quest to sustainably manage marine resources.

3 *Conclusion*

It is the position of this paper that almost all proposals for development at Te Raekaihau Point would indeed be 'inappropriate'. However, once a contextual consideration of this specific proposal had been undertaken, with a direct reference to the language of the Act, it is asserted that the majority should have found the proposal to be appropriate. Therefore, it is the contention of this paper that the majority, by

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[117] See Mark B. Orams "The Effectiveness of Environmental Education: Can We Turn Tourists into 'Greenies'?" (1997) 3 PTHR 295. Orams discusses the evidence that education can be an effective means of managing tourists' interaction with wildlife and the natural environment.
[118] Trust Deed of the Wellington Marine Conservation Trust, Statement of Aims and Objectives, para 4.1.
[119] *New Zealand Rail*, above n 61, 86 Greig J.
[120] *Save the Point*, above n 2, para 28.

failing to find that the proposal was an appropriate development within the coastal environment, erred in their consideration and application of section 6(a) of the RMA.

V IMPLICATIONS OF THE DECISION

This decision has no binding precedent effect on future Environment Court decisions. The Court of Appeal has declared, "[t]he most that can be said is that the granting of one consent may well have an influence on how another application should be dealt with".[121] Hence, it could be argued that even if the decision was incorrect, the wider implications of the case are limited. It is the contention of this paper that this decision sounds a warning bell for New Zealand environmental law. In particular, it is a cautionary tale of the uncertainty brought to the environmental sector through the composition of the Environment Court bench. Under section 265 RMA it is clear that two Commissioners are not required for a quorum.[122] However, it seems that the practice of having one Environment Judge and two Environment Commissioners has become increasingly prevalent.[123]

The bench that decided this case was composed of one legally qualified Environment Judge and two Environment Commissioners. The RMA states that the Commissioners are appointed "to ensure that the Court possesses a mix of knowledge and experience in matters coming before [it]".[124] Nolan believes the contribution of two Commissioners with specialised knowledge "enhances the acceptability of decisions".[125] However, this case – in which the Environment Judge was in the minority – demonstrates the problems with this composition.[126]

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[121] *Dye v Auckland Regional Council*, above n 32, 347 Tipping J.

[122] Section 265 provides that a quorum is: (a) One Environment Judge and one Environment Commissioner sitting together; or (b) One Environment Judge sitting alone for the purposes of section 279 or proceedings under Part 12; or (c) One Environment Commissioner sitting alone in accordance with a direction of the Principal Environment Judge under section 280.

[123] In 2004 and 2005 combined, only 60 per cent of reported Environment Court decisions (involving a bench of more than one) consisted of a single Judge and two Commissioners. In 2006 and 2007 combined, the figure was almost 80 per cent (78.6%).

[124] Resource Management Act 1991, s 253.

[125] Nolan, above n 14, 53.

[126] See also *Lobb v Auckland City Council* (13 July 2007) EC AK A061/07. Another case in which the Environment Judge was overruled by two Commissioners.

Issues in the Court are directly derived from differing interpretations of the RMA and are therefore legally based and argued. However, these issues – which turn on the definitions of key words – can end up being decided in a non-legal, subjective fashion. In the present case, the word 'inappropriate' and its relationship with the promotion of 'sustainable management', was not addressed objectively by the majority. They instead concentrated on issues such as the Centre's café and its other subsidiary purposes in their weighing exercise. The Environment Judge used a legal approach in applying the word 'inappropriate' to the proposal and section 5 of the RMA. He decided that the proposal fulfilled the statutory criteria.

If the goal in setting up the Court with lay Commissioners - who arguably bring a broader societal view - was to promote a subjective weighing-up exercise, then this case shows that the goal has been achieved. However, the practical implications of this result are significant.

Resource consent applicants will ordinarily seek legal advice at some stage of the consent process. Lawyers give them advice based on combining their client's unique factual situation with the lawyer's accumulated knowledge of past judicial decisions and interpretations. A client is entitled to expect a certain degree of certainty in the advice and analysis they receive. However, where a resource consent decision could vary depending on "the length of the Commissioner's foot",[127] lawyers are unable to give precise advice. This in turn leads to inefficiency in the consent process. For example, some meritorious applications may not be pursued because of the added risks involved in exposing an application to an uncertain, subjective, weighing exercise. Conversely, other more dubious applications may be sought due to a lawyer's inability to confidently discount the possibility of consent approval.

Thus, this paper suggests that if *legally* correct decisions are desired, and these problems of subjectivity are to be avoided, then the current practice of the Environment Court should be changed. The exact nature of the change is beyond the

[127] This is a modernization of the famous quote that 17th century Jurist John Selden used to describe the inconsistent decisions of the Court of Chancery

scope of this paper,[128] however it is suggested that a simple solution would be to adhere to section 265(1)(a) of the RMA where it states that a quorum for the Environment Court is one Environment Judge and one Environment Commissioner sitting together. Under paragraph (3) of that section, the Environment Judge's decision takes precedence. This simple adjustment would have resulted in a *legally* correct outcome in the present case.

If the Environment Court were not prepared to change the practice voluntarily, counsel could make use of section 279(fa) of the RMA and apply for an order, where questions of law and other matters are raised, directing that the proceeding be heard and decided by a bench of one Environment Judge and one Environment Commissioner. It is unclear how inclined the Environment Court would be to grant such applications at present. However, it is suggested that should the number of legally incorrect outcomes increase, so too might the willingness of Environment Judges to entertain these applications.

VI CONCLUSION

This paper has shown the mistakes made by the Environment Court in the *Save the Point* case. The Court first erred in its consideration of the section 104(a) 'actual and potential effects'. The Court failed to identify economic benefits that had been presented in evidence and then wrongly conflated 'economic benefits' and 'financial viability'. These were mistakes of law and ultimately led to a distorted analysis.

The majority erred further in their consideration of section 6(a) of the RMA. They failed to ask themselves the correct questions in terms of 'appropriateness' of the proposal. This meant that an opportunity was lost to fulfil the purpose of the RMA through education of the community.

This paper called attention to an increasing trend towards Environment Court benches consisting of one Environment Judge and two Environment Commissioners.

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[128] Changes could include: change of quorum requirements; stripping Commissioners of voting power, that is, having them as advisors to the Environment Judge; or altering the composition requirements so that Judges always outnumbered Commissioners.

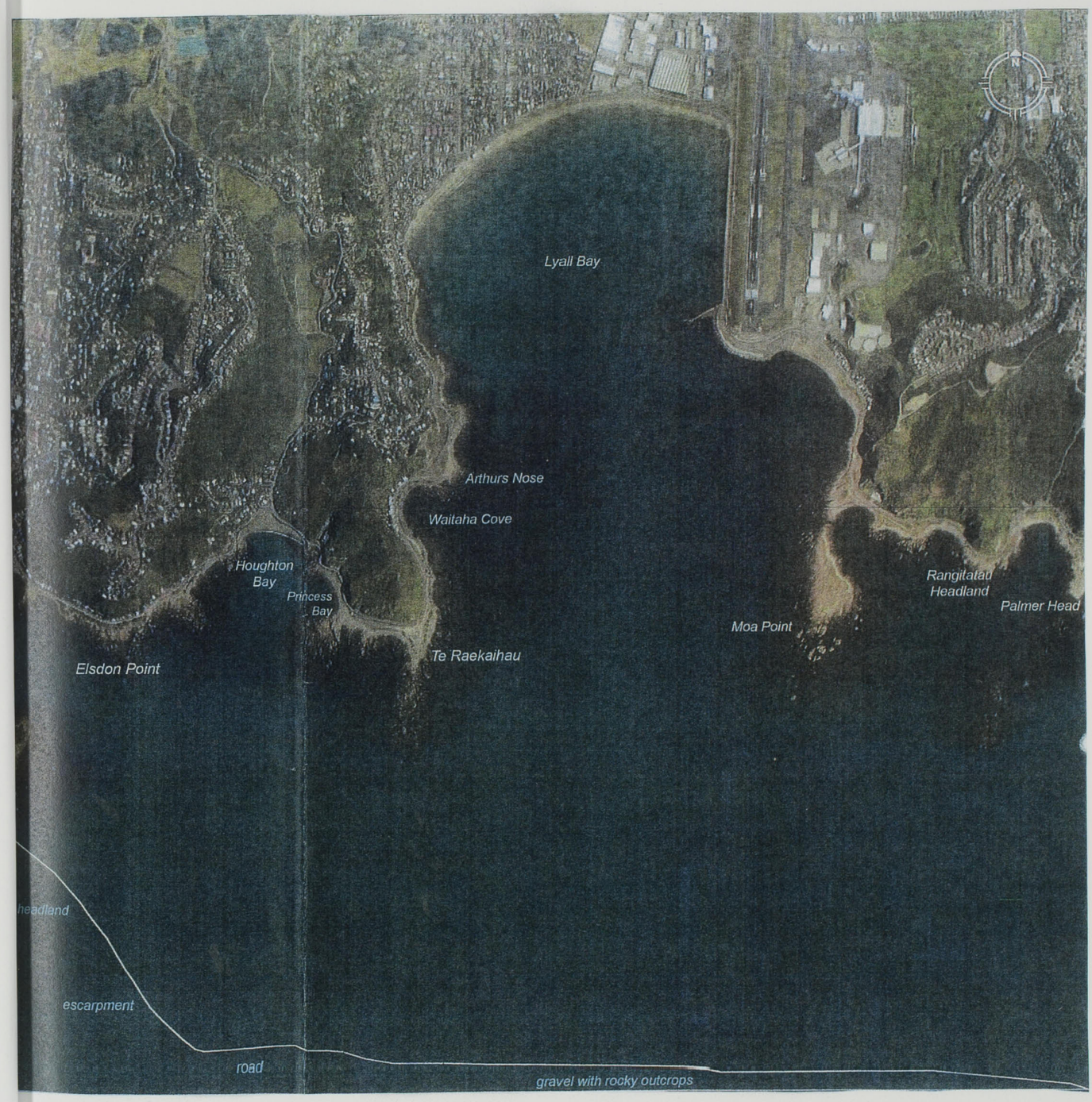
The RMA does not require this composition, and the outcome of the present case is an alarming corollary of the practice.

Ultimately, it would appear that contrary to the intentions of the RMA, preservation of the coastal environment was achieved here at the cost of the promotion of sustainable management of our resources. As Baba Dioum, the Senegalese environmentalist, observed in 1968 "[i]n the end we will conserve only what we love. We love only what we understand. We will understand only what we are taught".[129]

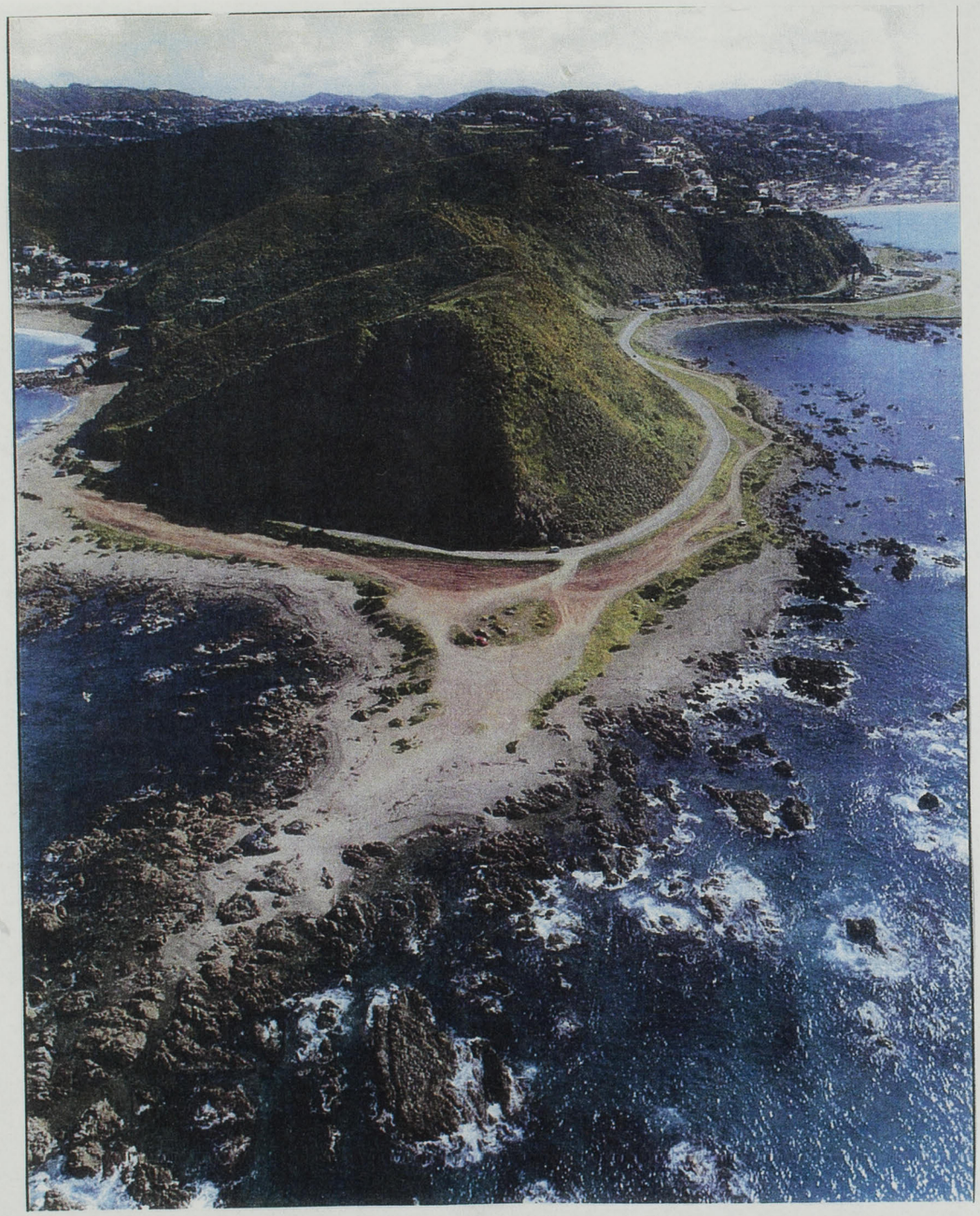
[129] Barbara Rodes *Dictionary of Environmental Quotations* (Johns Hopkins Univ Pr, Baltimore, 1997), 237.

VII APPENDICES

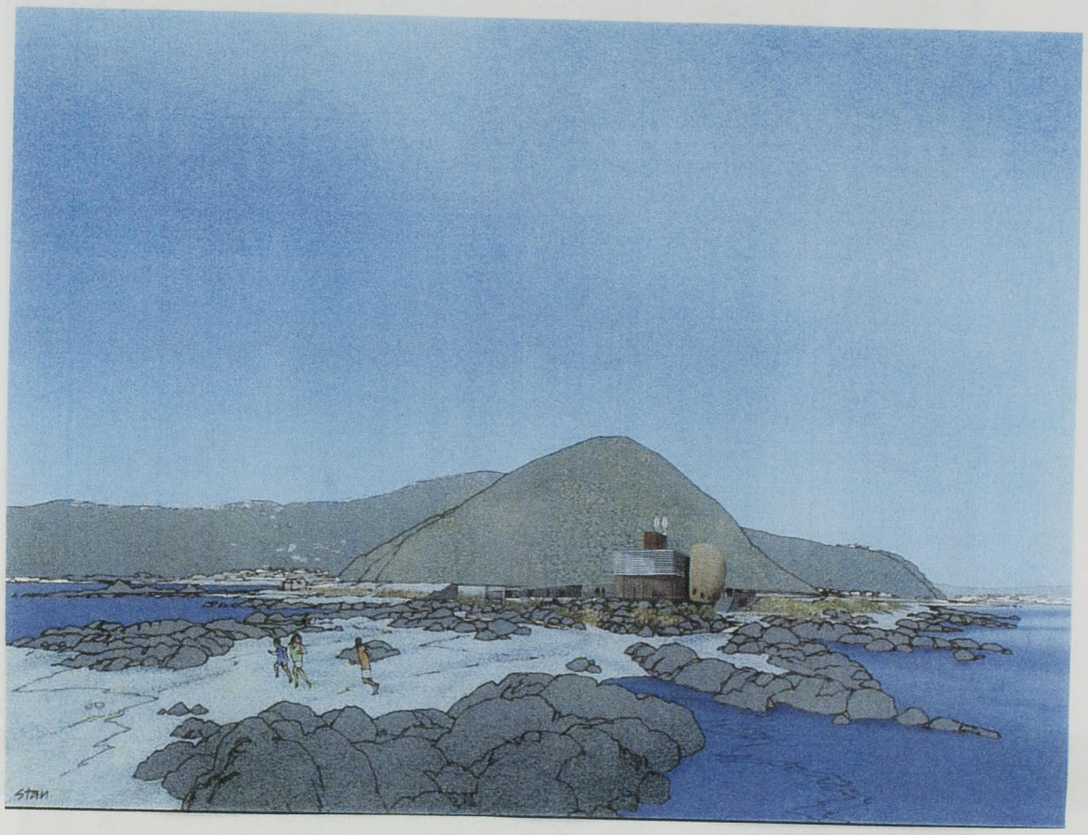
A Appendix 1 – Aerial View of South Coast



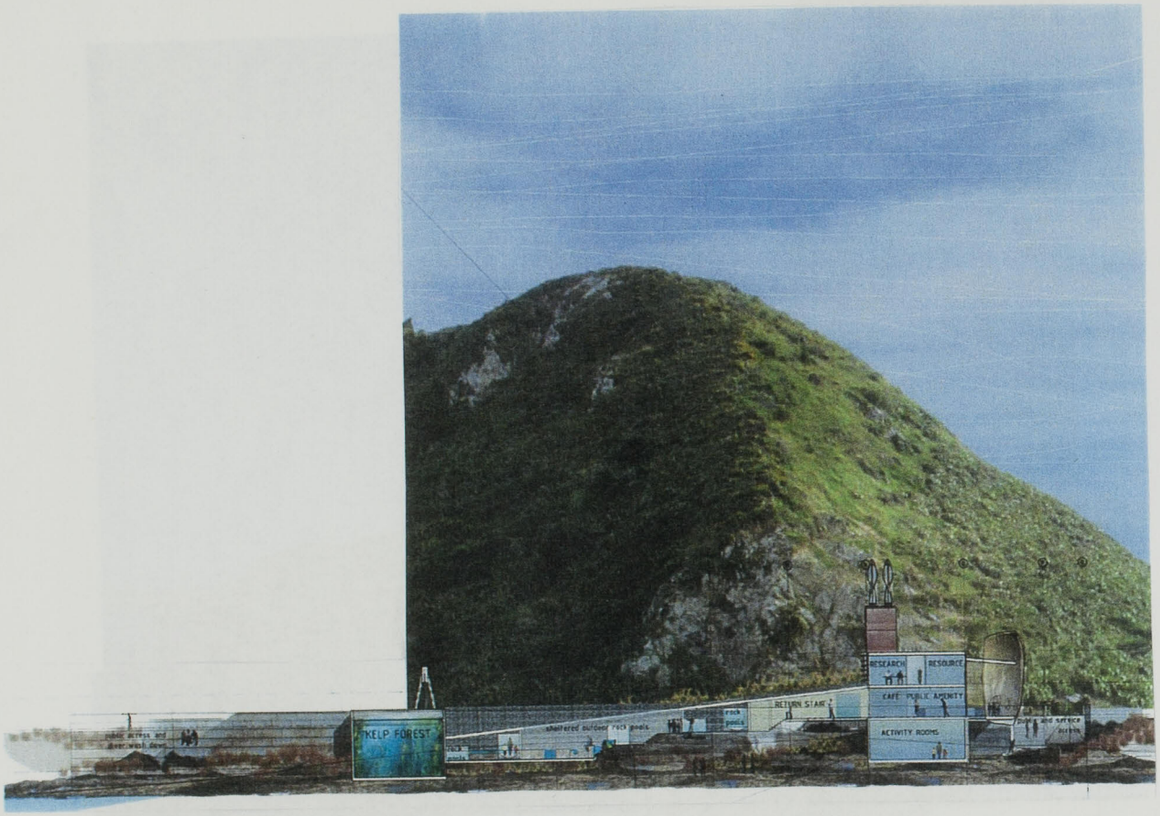
B Appendix 2 - Aerial Photograph of Te Raekaihau Point



C Appendix 3 - Artist's Impressions of Proposed Centre


STAN

D Appendix 4 - View of Split Levels



E Appendix 5 - Proposed Landscape Plan

proposed landscape plan with existing rock outcrops

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