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BELL GULLY

Kaipara District Council
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FROM **Andrew Beatson**
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EMAIL andrew.beatson@bellgully.com
MATTER NO. 01-344-7177
DATE 21 November 2011



Dear Submitter

Notice of Appeal on Proposed Kaipara District Plan

We act for Meridian Energy Limited.

We **enclose**, by way of service, a copy of our client's Notice of Appeal in respect of parts of the decision by Kaipara District Council on the Proposed Kaipara District Plan.

The Notice of Appeal was lodged in the Environment Court on Monday 21 November 2011.

The copy of the Notice of Appeal served on you does not include a copy of the appendices. If you require a copy of any appendices please contact us.

Yours faithfully
Bell Gully

A handwritten signature in black ink, appearing to be "Andrew Beatson".

Andrew Beatson
Partner

Enc.

**In the Environment Court
Auckland Registry**

ENV- 2011-

In the matter of the Resource Management Act 1991

Between

Meridian Energy Limited

Appellant

and

Kaipara District Council

Respondent

Notice of Appeal

21 November 2011

BELL GULLY

BARRISTERS AND SOLICITORS

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To The Registrar
Environment Court
Auckland

1. Meridian Energy Limited (**Meridian**) appeals part of a decision on the following matter:

Proposed Kaipara District Plan (the **Proposed Plan**).

2. Meridian received notice of the decision on 7 October 2011 (the **decision**).
3. The decision was made by the Kaipara District Council (the **Council**).
4. Meridian is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (the **RMA**).
5. The parts of the decision that Meridian is appealing relate to:
 - (a) Chapter 2;
 - (b) Chapter 4;
 - (c) Chapter 6;
 - (d) Chapter 9;
 - (e) Chapter 12;
 - (f) Chapter 15A;
 - (g) Chapter 15B; and
 - (h) Chapter 22.
6. The reasons for the appeal and the relief sought from the Court are set out in detail below. We note that Variation 1 of the Proposed Plan seeks to amend some of the provisions appealed.

New Issue for Renewable Energy

7. Reason for appeal: Meridian considers that the development of renewable energy should be expressly recognised as a stand-alone issue for the Kaipara District and should not be included as part of revised Issue 2.3.7. This is consistent with the direction provided in the National Policy Statement for Renewable Electricity Generation 2011 (the NPS).

Relief sought: Add the following new issue:

The development of renewable energy resources contributes to social and economic wellbeing, both within and beyond the District. Energy efficiency climate change, and the benefits of the use and development of renewable energy are matters to which the Council must have particular regard to under Section 7 of the RMA. The Kaipara District has the potential to provide for significant generation of renewable energy through its wind resource: this is particularly the case on the West Coast.

Objective 2.4.4

8. Reason for appeal: A blanket objective to “protect” sensitive environments is inconsistent with Part 2 of the RMA. The Proposed Plan should recognise that in some instances land use and development may be appropriate in sensitive environments, even though such use causes adverse effects.

9. Relief sought: Amend Objective 2.4.4:

To recognise and protect from inappropriate use and development those environments of the District which are the most sensitive to land use and development and which significantly contribute to the District's, Region's and/or Nation's identity.

Objective 2.4.8

10. Reason for appeal: The Proposed Plan fails to give effect to the NPS, as the relevant objective is merely to “encourage” and “promote” the

greater use and development of renewable energy resources, not enable its development and ongoing operation.

11. Relief sought: Add a new objective for renewable energy that gives effect to the NPS or amend Objective 2.4.8 as follows:

To enable the development, operation and management of utilities and the transport network throughout the District particularly where this is undertaken in conjunction with land use development and change; and to encourage and promote the efficient use of energy and enable the greater use and development, operation and maintenance of renewable energy resources.

New Provisions

12. Reason for appeal: The Proposed Plan fails to give effect to the NPS, as the policies do not enable the greater use and development of renewable energy resources.

Relief sought: Add new provisions to provide for and enable the greater use and development of renewable energy resources in all areas of the District.

Outcome 2.7.1

13. Reason for appeal: It is unrealistic to expect that a sustainable and well functioning economy will not generate adverse environmental effects.

14. Relief sought: Amend Outcome 2.7.1:

A sustainable and well functioning economy that provides for the social and economic wellbeing of the community ~~without generating significant adverse environmental effects.~~

Outcome 2.7.5

15. Reason for appeal: There needs to be recognition that not all amenity, heritage, natural character, and character of the District's unique communities and environments will be maintained and enhanced.

16. Relief sought: Amend Outcome 2.7.5:

The amenity, heritage, natural character and character of the District's unique communities and environments are generally maintained and enhanced and adverse effects of land use and development activities are avoided, remedied or mitigated.

Outcome 2.7.6

17. Reason for appeal: Section 6(f) of the RMA does not require that all specific sites of natural cultural and heritage value are preserved and protected outright. There needs to be recognition in the outcome that these matters will only be protected from inappropriate use and development.
18. Relief sought: Amend Outcome 2.7.6:

Specific sites of natural cultural and heritage value are preserved, and protected from inappropriate use and development , and where reasonably practicable, are enhanced.

New Issue for Overlays

19. Reason for appeal: If Chapter 4 is intended to outline the policy direction for the use of land within overlays then it is appropriate that this provides a framework for development as well as protection. The decision emphasised that there is a hierarchy between the chapters, and Chapter 2 adequately addresses concerns raised. However, the amended Proposed Plan does not reflect the position that the provisions in Chapter 2 have greater status than this in Chapter 4.
20. Relief sought: Add new issue to Chapter 4 as follows:

There is a need to provide for the appropriate use and development of the natural and physical resources in the West Coast Overlay in order to provide for the social and economic wellbeing of people, communities and the region.

Objective 4.4.1

21. Reason for appeal: Section 6(a) of the RMA does not require that areas of natural character are protected from all forms of development. Further, Section 7 only requires decision makers to have particular regard to the maintenance and enhancement of amenity values and it is inappropriate that only land use and development that maintains and enhances amenity values be enabled.

22. Relief sought: Amend Objective 4.4.1:

To enable land use and development in the West Coast Overlay, while ensuring where appropriate it is compatible with:

- The protection of areas of high natural character from inappropriate land use and development;
- Maintaining and enhancing water quality of sensitive receiving environments; and
- Maintaining and enhancing amenity values (e.g. wilderness values and the built character)

Objective 4.4.6

23. Reason for appeal: It is appropriate that the objective only relates to land use and development in the Harbour Overlays, and that cultural and amenity values are only maintained and enhanced.

24. Relief sought: Amend Objective 4.4.6:

To enable land use and development of in the Harbour Overlays, while ensuring where appropriate where it is compatible with:

- The protection of habitats and ecological values;
- Maintaining and enhancing the water quality of the receiving environments; and

- Recognising and ~~protecting~~ maintaining and enhancing cultural, heritage and amenity values including the special sense of place of the Mangawhai Harbour catchment and the rural character of the Kaipara Harbour hinterland.

Outcome 4.7.1

25. Reason for appeal: Amendments are required to the outcome to be consistent with the above proposed changes.

26. Relief sought: Amend Outcome 4.7.1:

Activities on or adjoining sensitive receiving environments are managed to ~~protect and~~ maintain where appropriate and reasonably practicable the areas with high natural character values of these areas (including water quality).

Policy 4.5.3

27. Reason for appeal: In the West Coast Overlay it is more appropriate for the management of the scale, location, and design of activities to be directed towards the protection of natural character from inappropriate use and development than to the maintenance of amenity values.

28. Relief sought: Amend Policy 4.5.3:

By managing as far as practicable the scale, location, and design of activities particularly with respect to built form to ~~maintain amenity values and protect~~ natural character from inappropriate use and development within the West Coast Overlay.

Objective 6.5.2

29. Reason for appeal: It is appropriate that the objective to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna recognises that some form of subdivision, use, and development may still be appropriate in such areas.

30. Relief sought: Amend Objective 6.5.2:

~~“To provide for the protection of and promote the active management of areas of significant indigenous vegetation and significant habitats of indigenous fauna from inappropriate subdivision, use and development and to promote active management of such areas where appropriate.”~~

Policy 6.2.2

31. Reason for appeal: In terms of scale, intensity and location of land development activities it is only appropriate that such aspects are managed to avoid, remedy or mitigate significant adverse effects. The explanation suggests that if effects on areas of significant indigenous vegetation or significant habitats of indigenous fauna cannot be avoided then applications will be declined. This is inappropriate in light of section 5 of the RMA and its sustainable management purpose.
32. Relief sought: Amend Policy 6.2.2:

By managing the scale, intensity and location of subdivision and land development activities in a way that avoids remedies or mitigates significant adverse effects on areas of significant indigenous vegetation or significant habitats of indigenous fauna.

Amend explanation to Policy 6.2.2:

All subdivision and land development activities will be assessed to determine whether they may result in adverse effects on significant ecological areas. Conditions may be imposed to avoid, remedy or mitigate adverse effects ~~or applications declined when effects cannot be avoided.~~ The Council will seek alternatives to the disturbance of habitats where practicable...

Definition of “Sites of Significance to the Department of Conservation”

33. Reason for appeal: Meridian considers that assessments of significance and ranking should be based only on criteria contained in and adopted in the Proposed Plan, and the criteria in Appendix 24G – Assessment of Ecological Significance in Part D of the Plan. It is

inappropriate to refer to those sites determined by the Department of Conservation without any public input via statutory processes.

34. Relief sought: Delete the definition of “Sites of Significance to the Department of Conservation” or amend as follows:

Sites of Ecological Significance - Areas of Significant Indigenous Vegetation and Significant Habitats of Indigenous Fauna

All those sites assessed as being of containing indigenous vegetation or habitat ranked moderate, moderate-high, high or outstanding on the Sites of Significant Biological Interest (SSBI) database or equivalent under the Department of Conservation's Protected Natural Areas (PNA) Programme. In the absence of an assessment of the ranking of an ecological feature, assessments of significance and ranking are based on the criteria contained in Appendix 24g - Assessment of Ecological Significance in Part D of the Plan (being the criteria listed in Appendix III of the Northland Regional Policy Statement).

Definition of “Maintenance”

35. Reason for appeal: The proposed definition applies to very limited contexts. This is inappropriate as it often applies to infrastructure, including renewable electricity generation.
36. Relief sought: Delete definition of ‘maintenance’.

Discretion Assessment Criteria

37. Reason for appeal: It is not clear that the Council has restricted its discretion, or reserved control, over the matters in the Assessment Criteria. The decision states that this is the intent but this should be reflected in the provisions of the Proposed Plan to remove any ambiguity.
38. Relief sought: Add the following statement where relevant:

The Assessment Criteria are the matters over which the Council has restricted its discretion for restricted discretionary activities, or reserved control over for controlled activities.

Assessment Criteria for Rule 12.10.1 – Excavation and Fill

39. Reasons for appeal: Consequential amendments are sought to any Assessment Criteria in the rules in the Proposed Plan, regarding “effects on ecological values” to refer to the significance of ecological sites being based only on the criteria contained in Appendix 24g - Assessment of Ecological Significance. As outlined above, it is inappropriate to refer to those sites determined by the Department of Conservation without any statutory public input.
40. It is inappropriate to refer to the Council’s Landscape Technical Report (2011) as any sites identified in this report have not been accepted through the Proposed Plan statutory process as having such values. The merit for their inclusion or otherwise, should be assessed as part of Variation 1 to the Proposed Plan.
41. The reference to neighbouring property owners is inappropriate to include as an assessment criterion. Further, it reinterprets the requirements of the RMA for the process of assessing potentially affected parties and assessing the effects on the environment.
42. Relief sought: Amend Assessment Criteria for Rule 12.10.1:

Where an activity is not permitted by this Rule, Council will have regard to the following matters when considering an application for resource consent:

....

- (E) Effects on ecological values and in particular any Sites of Ecological Significance ~~or by reference to~~ determined in accordance with the criteria listed in Appendix 24G;
- (G) Effects on landscape and heritage values, in particular any site identified as an ONL or an amenity landscape in the District Plan ~~or an amenity landscape identified in Council's Landscape Technical Report (2011);...~~

- (J) ~~Whether and the extent to which neighbouring property owners or occupiers (within 200m of the proposed activity) have been consulted and their concerns (if any) have been addressed;~~

Assessment Criteria for Rule 12.10.2 – Vegetation Clearance

43. Reasons for appeal: Consequential amendments are sought to any Assessment Criteria in the rules in the Proposed Plan, regarding “effects on ecological values” to refer to the significance of ecological sites being based only on the criteria contained in Appendix 24g - Assessment of Ecological Significance. As outlined above, it is inappropriate to refer to those sites determined by the Department of Conservation without any statutory public input.
44. It is inappropriate to refer to the Council’s Landscape Technical Report (2011) as any sites identified in this report have not been accepted through the Proposed Plan statutory process as having such values. The merit for their inclusion or otherwise, should be assessed as part of Variation 1 to the Proposed Plan.
45. It should be expressly acknowledged that the assessment criterion dealing with the affects on the values of the Overlays are only relevant in the assessment of activities that occur within the Overlay Areas.
46. Relief sought: Amend Assessment Criteria for Rule 12.10.2:

Where an activity is not permitted by this Rule, Council will have regard to the following matters when considering an application for Resource Consent:.....

- (C) Effects on the locality, particularly the rural character and amenity values and if within an overlay those values associated with the overlay areas;
- (D) Effects on ecological values and in particular any Sites of Ecological Significance ~~or by reference to~~ determined in accordance with the criteria listed in Appendix 254G;
- (E) Effects on landscape and heritage values, in particular any site identified as an ONL or an amenity landscape in the District Plan

or an amenity landscape identified in Council's Landscape Technical Report (2011);...

Assessment Criteria for Rule 12.10.4 – Commercial and Industrial Buildings

47. Reasons for appeal: It is inappropriate to refer to the Council's Landscape Technical Report (2011) as any sites identified in this report have not been accepted through the Proposed Plan statutory process as having such values. The merit for their inclusion or otherwise, should be assessed as part of Variation 1 to the Proposed Plan.
48. It should be expressly acknowledged that the assessment criterion dealing with the affects on the values of the Overlays are only relevant in the assessment of activities that occur within the Overlay Areas.
49. Relief sought: Amend Assessment Criteria for Rule 12.10.4:

Where an activity is not permitted by this Rule, Council will have regard to the following matters when considering an application for Resource Consent:

Building location, including alternatives considered;...

- (D) Whether and the extent to which the building and activity is compatible with the locality, particularly the rural character and amenity values and if within an overlay those values associated with the Overlay areas;
- (E) Effects on landscape, ecological and heritage values of any site identified in the District Plan or a landscape identified as an ONL or amenity landscape in the District Plan;

Assessment Criteria for Rule 12.10.7 – Setbacks – Performance Standards

50. Reasons for appeal: Consequential amendments are sought to any Assessment Criteria in the rules in the Proposed Plan, regarding "effects on ecological values" to refer to the significance of ecological sites being based only on the criteria contained in Appendix 24g -

Assessment of Ecological Significance. As outlined above, it is inappropriate to refer to those sites determined by the Department of Conservation without any statutory public input.

51. It is inappropriate to refer to the Council's Landscape Technical Report (2011) as any sites identified in this report have not been accepted through the Proposed Plan statutory process as having such values. The merit for their inclusion or otherwise, should be assessed as part of Variation 1 to the Proposed Plan.

52. It should be expressly acknowledged that the assessment criterion dealing with the affects on the values of the Overlays are only relevant in the assessment of activities that occur within the Overlay Areas.

53. Relief sought: Amend Assessment Criteria for Rule 12.10.7:

Where an activity is not permitted by this Rule, Council will have regard to the following matters when considering an application for Resource Consent:

The outlook and privacy of adjacent and adjoining neighbours;...

(D) Effects on the locality, particularly the rural and natural character and amenity values and if within an Overlay those values associated with the Overlay Areas;

(E) Effects on landscape and heritage values, in particular any site identified as an ONL or an amenity landscape in the District Plan ~~or an amenity landscape identified in Council's Landscape Technical Report (2011);~~

(F) Effects on ecological values and in particular any Sites of Ecological Significance ~~or by reference to~~ determined in accordance with the criteria listed in Appendix 24G;

Policy 22.6.1

54. Reason for appeal: Financial contributions should not be required to mitigate "any" adverse environmental effect of an activity. The policy

should refer to the scale or significance of the adverse environmental effect that would justify the requirement for a financial contribution.

Relief sought: Amend Policy 22.6.1:

By clearly identifying the significant adverse environmental effects of subdivision and development which may be addressed by requiring a financial contribution.

Policy 22.6.8

55. **Reason for appeal:** Policy 22.6.8 imposes an extremely low threshold for the taking of financial contributions. No consideration is given to the significance of the effect. Meridian considers this is inappropriate, particularly as Policy 22.6.8 is designed to give effect to Objective 22.5.4 which specifically refers to land use and development that “significantly impacts” on natural environmental and heritage values. The policy should reflect this higher threshold.

56. **Relief sought:** Amend Policy 22.6.8:

By requiring financial contributions to protect or enhance natural environments and heritage values where an significant adverse effect of an activity has been identified that has not otherwise been remedied or mitigated.

Amend the explanation to Policy 22.6.8:

Where it has been demonstrated that an activity will generate significant adverse effects on heritage and the natural environment, Council is able to take financial contributions for the purpose of the protection and enhancement of these values. However, it is also recognised that there may be an opportunity for other environmental contribution (rather than financial contribution) to be made to remedy or mitigate such adverse effects.

Outcome 22.8.7

57. *Reason for appeal:* The outcome should clearly reflect Objective 22.5.4 which focuses on significant impacts.

Relief sought: Amend outcome 22.8.7:

"Significant adverse effects on the natural environments and heritage resources of the District will be avoided, remedied or mitigated. Mitigation may include the improved protection and enhancement of natural environments and heritage resources of the District through the use of Financial Contributions.

Rule 22.10.2

58. *Reason for appeal:* The assessment criteria is poorly worded and provides limited direction to decision makers on the circumstances when financial contributions will be taken and the amount of contribution that could be imposed.

Relief sought: Amend the Assessment Criteria to provide appropriate direction, including the following amendments to the Assessment Criteria for Significant Heritage or Ecological Features:

The Council will have regard to the following matters when assessing making decisions about the imposition of financial contributions and determining the level of financial contribution for significant heritage or ecological features in respect of subdivision and land use consents:

- (i) The degree of significant adverse environment effects of the activity, subdivision or land use on the significant heritage or ecological feature;
- (ii) If ecological protection or enhancement measures have already been or are proposed as part of the activity, subdivision or land use application within the general area affected by the activity or where this is not practicable or desirable in another location, to mitigate any significant

adverse effects of the activity, subdivision or land use application on the significant heritage or ecological feature.

Appendix B

59. *Reason for appeal:* The West Coast Overlay is coarse and it is difficult to identify the precise boundary. It needs to be better defined. The Natural Values Assessment Report stated that the coastal environment is largely delineated by the crest of the coastal escarpment. From that point on the land slopes to the east, has a marked rural character (often with forestry) and coastal influences are far less obvious.

Relief sought: Add further definition in the Proposed Plan to identify the issues raised above. This could be achieved through: providing a higher resolution plan, making express reference to the underlying GIS data or by expressly recording in the text of the plan that the West Coast Overlay ends at the top of the coastal escarpment.

Relief Sought

60. Meridian seeks the following relief from the Court:
- (a) The relief specified in this notice of appeal under each heading 'relief sought'; or
 - (b) Such further, consequential or alternative relief as may be necessary or appropriate to give effect to the relief sought.
61. The following documents are attached to this notice of appeal:
- (a) A copy of Meridian's submission and further submission (with a copy of the submission opposed or supported by my further submission);
 - (b) A copy of the relevant decision of the Council; and

- (c) A list of names and addresses of persons to be served with a copy of this notice.



AJL Beatson/ N J Garvan

Solicitor for Meridian Energy Limited

Dated: 21 November 2011

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Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

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

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

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

Advice

If you have any questions about this notice, contact the Environment Court Unit of the Department of Courts in Auckland.

Appendix A

A copy of the relevant part of the decision

Appendix B

**A list of names and addresses of persons to be served
with a copy of this notice**