BEFORE THE ENVIRONMENT COURT

Decision No. C081/2009

IN THE MATTER of an appeal under Clause 27 of Schedule 1 of the Resource Management Act 1991

BETWEEN OYSTER BAY DEVELOPMENTS LIMITED

(ENV-2007-CHC-305)

Appellant

AND MARLBOROUGH DISTRICT COUNCIL

Respondent

Hearing at: Blenheim on 27-31 July, and 1-3 September 2009

Court: Alternate Environment Judge D F G Sheppard (presiding)
Environment Commissioner J R Mills
Deputy Environment Commissioner D Kernohan

Appearances: P M James for the appellant
M J Radich for the respondent
E S Jorgensen for Port Underwood Association (under section 274)

Date Issued: 22 September 2009

DECISION OF THE ENVIRONMENT COURT

A. The appeal is disallowed, the respondent's decision confirmed, and the plan change request rejected.

B. The question of costs is reserved. Directions are given.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Introduction

[1] Although only parts are formally identified as an area of outstanding landscape value, Port Underwood in the Marlborough Sounds is a part of the coastal environment that possesses high natural character values.

[2] Oyster Bay is located on the west coast of the western arm of Port Underwood. A dozen houses exist on flat land; there are small structures associated with commercial and recreational fishing; and electricity transmission lines cross at some height over the land. Apart from those, the bay retains its natural landform and relief; some remnant and regenerating areas of native bush remain; and generally it retains significant natural character.

[3] Section 6 of the Resource Management Act (RMA) directs decision-makers to recognise and provide, as matters of national importance, for (among other things) the preservation of the natural character of the coastal environment, and protection of it from inappropriate subdivision, use and development.

[4] Section 7 directs decision-makers to have particular regard to (among other things) the efficient use and development of natural and physical resources; the maintenance and enhancement of amenity values, and of the quality of the environment.

[5] The New Zealand Coastal Policy Statement urges that policy statements and plans should recognise the contribution that open space makes to amenity values in the coastal environment; and should give appropriate protection to areas of open space to maintain and enhance those values.[1] It also indicates that adverse effects of subdivision, use and development in the coastal environment should, as far as practicable, be avoided or mitigated; and provision made for remedying those effects.[2] The Coastal Policy Statement directs that provision should be made to ensure that cumulative effects of activities in the coastal environment are not adverse to a significant degree.[3]

[6] Consistent with those contents of the Coastal Policy Statement, the Marlborough Regional Policy Statement contains several objectives and policies, including ensuring

[1] New Zealand Coastal Policy Statement 1994, Policy 3.1.3.
[2] Ibid, Policy 3.2.2.
[3] Ibid, Policy 3.2.4.

the appropriate subdivision, use and development of the coastal environment;[4] and preserving the natural character of the coastal environment.[5]

[7] The land of the Marlborough Sounds is in the Marlborough Region and District, the Marlborough District Council (MDC) being a unitary authority; and the Marlborough Sounds Resource Management Plan (MSRMP) is a combined regional, district and coastal plan for the Marlborough Sounds area.

[8] Consistent with section 6(a) of the RMA, the Coastal Policy Statement and the Regional Policy Statement, the MSRMP states objectives of the preservation of the natural character of the coastal environment and its protection from inappropriate subdivision, use and development;[6] of enabling residential activity along the coastal margin of the Sounds to the extent that this avoids or mitigates adverse effects on the environment;[7] maintaining and enhancing the amenities and landscape character of residential environments;[8] and provision for the subdivision of land in a manner which recognises and is appropriate to the natural form and environmental characteristics of the Plan area.[9]

[9] Policies for implementing the objectives of the MSRMP include encouraging appropriate use and development in areas where the natural character of the coastal environment has already been compromised, and where adverse effects can be avoided, remedied or mitigated;[10] preserving the natural character of the coastal environment by enabling appropriate residential use and development in areas where the natural character has already been compromised;[11] ensuring that activities along the coastal margin avoid, remedy or mitigate adverse effects on the natural environment, and areas of significance to amenity values;[12] and ensuring appropriate subdivision that avoids, remedies or mitigates adverse effects on the natural character of the coastal environment.[13]

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[4] Marlborough Regional Policy Statement, 1995, Policy 7.2.8.
[5] Ibid, Policy 8.1.6.
[6] MSRMP, 2.2, Objective 1.
[7] Ibid, 10.2.1.1, Objective 2.
[8] Ibid, 10.2.3.1, Objective 1.
[9] Ibid, 23.3, Objective 1.
[10] Ibid, 2.2, Policy 1.2.
[11] Ibid, 10.2.1.1, Policy 2.2.
[12] Ibid, 10.2.1.1, Policy 2.3.
[13] Ibid, 23.3, Policy 1.4.

[10] Among the methods for implementing the policies, the land at Oyster Bay is generally zoned Rural 1, although a small piece has been zoned Sounds Residential.

[11] Of the dozen houses existing at Oyster Bay, six are in the Sounds Residential zone, four in a non-compliant subdivision of land zoned Rural 1 (in which houses are limited to one per 30 hectares); and one is said to have stood on its site since around 1840.

The Proposed Plan Change

[12] The RMA provides that anyone may request a change to a district plan or a regional plan.[14]

[13] In 2006, Oyster Bay Developments Limited (OBDL) requested a change to the MSRMP by which certain land at Oyster Bay having a total area of about 26 hectares would be rezoned from Rural 1 to Sounds Residential; a new policy would be inserted; and existing plan explanation, policies and subdivision rules would be amended.

[14] Subdivision of land in the Rural 1 zone that creates lots less than 30 hectares is a non-complying activity; but subdivision of land with sewerage reticulation in the Sounds Residential zone that creates lots no smaller than 2,000 square metres is a controlled activity. The result of the requested rezoning would be that if sewerage reticulation is provided, the subject land at Oyster Bay would be able to be subdivided into as many as about 52 additional residential lots as small as 2,000 square metres.

[15] The MDC identified the changes to the MSRMP requested by OBDL as Private Plan Change 15. In accordance with the prescribed procedure, the Council accepted the request, and following consultation, notified the change, and then notified the submissions to allow further submissions. Among those who lodged submissions was the Port Underwood Association Incorporated.

[16] Following a public hearing over two days, the Council notified its decision to reject OBDL's request for the plan change, giving its reasons. OBDL then lodged this

[14] RMA, Sched 1, cl 21(1).

appeal against that decision, seeking that its request to change the zoning be granted. The appeal was opposed by the MDC, and by the Port Underwood Association.

Alterations to Proposed Plan Change

[17] At the appeal hearing, OBDL proposed several alterations to the proposed plan change. We list the main alterations:

[a] Reducing the area to be rezoned Sounds Residential from about 26 hectares to about 19.74 hectares;

[b] Limiting the maximum number of dwellings in that area to 41, and amending clauses 10.2.1.1 and 27.2.1.1(c) accordingly;

[c] An outline development plan showing areas for dwellings, 'no-build' areas, and a common sewage disposal area;

[d] Amending clauses 10.2.1.1, 16.3.1.7 and 27.2.1.1 and the advisory note to Appendix J to state that flood mitigation activity is to be solely directed to the entire area identified as being affected by a flood hazard notation within the 19.74-hectare site;

[e] Minor amendments to clause 27.2.5.2.

Jurisdiction to Consider Amended Plan Change

[18] The Council contended that the alterations to the proposed plan change would extend it beyond the change that had been publicly notified; that they had not been raised by OBDL or any submitter in submissions or further submissions on the plan change; had not been sought in OBDL's notice of appeal; but had only been formally sought in the evidence of a witness called in the appeal hearing on behalf of OBDL. It submitted that the Court has no jurisdiction to consider those alterations, as the particular relief sought had not been raised in submission or further submission. Counsel relied on *Canterbury*

Regional Council v Apple Fields[15]; *Hamilton City Council v New Zealand Historic Places Trust*[16] and *General Distributors v Waipa District Council.*[17]

[19] OBDL denied that the alterations to the plan change go beyond what had been fairly and reasonably raised in submissions on the plan change, and contended that they are, as a question of degree, minor, and within the Court's jurisdiction on the appeal. As well as referring to the authorities relied on by the Council, counsel for OBDL also cited *Countdown Properties (Northlands) v Dunedin City Council*;[18] *Royal Forest and Bird Protection Society v Southland District Council*;[19] *Hauraki Mäori Trust Board v Waikato Regional Council*;[20] *Shell NZ v Porirua City Council*;[21] and *Green & McCahill Properties v North Shore City Council.*[22]

[20] At OBL's request, and against the Council's urging that the jurisdictional point should be argued and decided as a preliminary issue prior to hearing the evidence, the Court proceeded to hear the evidence of all parties prior to hearing OBDL's argument in response to the jurisdictional point. This assisted the Court to understand more fully the significance of the amendments to the plan change as originally requested. Such a practice has long been common in addressing demurrer applications in planning cases.[23]

[21] The most recent of the authorities on amendments to planning instruments is *General Distributors*. In his Judgement in that case, Justice Wylie identified no conflict among the earlier cases. So this Court applies the law on the topic as he declared it to be.

[22] From that Judgement we identify these elements for deciding whether an amendment to a change to a planning instrument is within or beyond jurisdiction (citing the relevant paragraphs in *General Distributors*):

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[15] [2003] NZRMA 508 (HC).
[16] [2005] NZRMA 145(HC).
[17] (2008) 15 ELRNZ 59 (HC).
[18] [1994] NZRMA 145 (FC).
[19] [1997] NZRMA 408 (HC).
[20] High Court, Auckland; 4 March 2004, Randerson J.
[21] Court of Appeal, CA 57/05; 19 May 2005.
[22] (1991) 15 NZTPA 79 (Plg Tbnl).
[23] See for example *Blencraft v Fletcher Development Co* [1974] 1 NZLR 295 per Cooke J at p 312 lines 40-43.

[a] The terms of the proposed change and the content of submissions filed delimit the Environment Court's jurisdiction [64];

[b] Whether an amendment goes beyond what is reasonably and fairly raised in submissions on the plan change will usually be a question of degree to be judged by the terms of the plan change and of the content of the submissions [58];

[c] That should be approached in a realistic workable fashion rather than from the perspective of legal nicety, and requires that the whole relief package detailed in submissions be considered [59][60].

[23] We now apply those elements to the case.

[24] The MDC identified the following alterations to the plan change originally requested:

- The area of land proposed to be rezoned is different.
- An outline development plan is intended to form part of the plan change.
- An effluent disposal field is proposed.
- New amendments to Chapters 10 and 16 of the MSRMP are proposed.
- New amendments to Rules 27.2.1.1 and 27.5.5.2 of the MSRMP are proposed.
- New amendments to the Planning Maps in Volume 3 of the MSRMP are proposed.

[25] MDC contended that:

[a] none of those alterations to the plan change had been raised in any submission or further submission;

[b] nor had any of them been notified to the public, nor even to submitters;

[c] nor had any of them been considered by the Council;

[d] nor had any of them been made the subject of the appeal to the Court;

and submitted that the Court is limited to considering the plan change as originally requested, not as it would be altered in the ways described.

[26] OBDL responded that the alterations are minor, and contended that they do not go beyond what was publicly notified (being merely refinements of detail or clarification that do not broaden it); and matters raised in the submissions, or further submissions; and were covered in the appeal and the evidence. It also contended that they remedy unintentional mistakes and defects to ensure that the plan change links with the MSRMP, and would cause no prejudice to other parties or the public interest.

[27] OBDL addressed specific alterations. In respect of the land to be rezoned, it explained that it is to be reduced from 26 hectares to 19.7 hectares, to allay concerns in submissions about the possibility of further subdivision and greater density. It contended that this reduction would not broaden the scope of the plan change, but would lessen it to try and accommodate concerns raised in submissions.

[28] The reduction of the size of the land to be rezoned would not extend beyond the boundaries of the land to be rezoned in the original plan change request, but would reduce the scale of development allowed by rezoning the reduced area Sounds Residential. That would respond to submissions by Ruth Simonsen against large subdivisions; by Gregory and Patricia McLean that the area to be rezoned is excessively large; by Gaylene and Graham Beattie that the number of sections be restricted; by the Penney Family Trust opposing the number of possible sections; by P and A Kircher opposing the size of the potential development; by Irene Ross opposing the number of sections that could possibly be created; and by Bruce and Jill Hearn opposing the size of subdivision with potential for 80 sections, although they would not oppose small subdivisions.

[29] We judge that this alteration would not broaden the plan change beyond the limits of what was originally requested and what is reasonably and fairly to be understood from the content of submissions; nor would it prejudice anyone who failed to lodge a submission on the original request.

[30] The outline development plan identifies, on the reduced area to be rezoned, a piece of the land to be a sewage disposal area; a piece of land to be restricted to a maximum of one dwelling; an area to be restricted to a maximum of 40 dwellings; and the boundaries of four 'no build' areas.

[31] By the end of the appeal hearing, OBDL had announced that it intended that those features of the outline development plan would be given effect by a rule in the plan change. On that basis, the effect of the outline development plan would be to restrict further the subdivision, use and development of the subject land on being rezoned Sounds Residential.

[32] Those restrictions would meet, to some extent, the content of submissions opposing the potential number of lots that could be created by subdivision of the land if rezoned: including those by Gregory and Patricia McLean; Claire and David Hutchison; Gaylene and Graham Beattie; the Penney Family Trust; Jane Kircher; Irene Ross; Matene Love; and Bruce and Jill Hearn.

[33] We judge that this alteration to the plan change would not broaden it beyond the limits of what was originally requested, nor extend it beyond what is reasonably and fairly to be understood from the content of submissions; nor would it prejudice anyone who failed to lodge a submission on the original request.

[34] The identification on the outline development plan of the proposed location of a sewage disposal area would not itself have effect to authorise establishment of that activity on that part of the subject land, because sewage disposal is not a permitted activity in the Sounds Residential zone. A specific resource consent would be needed to establish it; and the indication of a potential site in the outline development plan would not prejudice any submission in opposition to an application for such consent.

[35] Provision of a common sewage disposal area for Oyster Bay would respond to submissions by Ruth Simonsen that waste-water sewerage has not been a success in the area; by Gregory and Patricia McLean questioning whether the soil would be able to cope with other disposal systems; by Claire and David Hutchison about overflow from sewerage on shellfish beds; by Gaylene and Graham Beattie about sewage in peak times and contamination from sewage; by the Penney Family Trust on concerns with septic disposal; by P and A Kircher on potential for sewage pollution; by R R and R A

Kirkwood on concentration of septic tank treatment systems; by Clintondale Trust on location of a central sewage scheme; by T A Dunn and others on sewage leach into the bay; by L Hinton and J Kennedy on sewage disposal; by Irene Ross on sewage and pollution; by Marie C Saul on water contamination and sewage, and a septic system to not pollute surrounding land; by Matene Love on his concern about the sewage system; by Jeremy and Annie Ward on their concern whether the sewage system would be able to cope with the number of possible dwellings and consequent pollution; by David Taylor citing possible increase of sewage run-off into Oyster Bay; and by Martin Elliot Loach on his concern about sewage disposal and polluting the bay.

[36] Therefore we judge that the alteration to the plan change identifying a sewage disposal area would not broaden the plan change beyond the limits of what was originally requested, nor extend it beyond what is reasonably and fairly to be understood from the content of submissions; nor would it prejudice anyone who failed to lodge a submission on the original request.

[37] OBDL has proposed two alterations to the original plan change that would make new amendments to Chapters 10 and 16 of the MSRMP. One would limit an obligation to carry out flood mitigation works to the part of the subject land to be rezoned Sounds Residential that is affected by a flood hazard overlay. That reduction in the extent of flood works does not qualify as a response to submissions on the plan change. However it is plainly no more than a refinement of detail, there being no point in obliging the carrying out of flood mitigation works on parts of the land that have not been identified as being at hazard of flooding.

[38] The other new amendment to Chapter 10 would be to insert a new explanatory sentence that development is limited to a maximum of 41 dwellings. The effect would be to restrict further the development that might otherwise be carried out on the subject land if rezoned Sounds Residential.

[39] That restriction responds to concerns about the extent of development raised in several submissions on the plan change: by A and M Still opposing the extent of the increase in residential sections; by Nelson Ranger Farms opposing the concentration of sections in one area; by Gregory and Patricia McLean that the development is excessively large; by K and S Roush raising the increase in the number of residential lots; the Patricia Maxwell Platts that there are more than enough dwellings in the area already; by Gaylene

and Graham Beattie raising a restriction in the number of sections; by the Penney Family Trust opposing the very large number of possible sections; by Jane Kircher opposing creating an area of high density housing; by P and A Kircher opposing the size of the development of 40-plus sections; by R R and R A Kirkwood raising the potential of up to 60 new residences, and proposing a limit on the number of 10-15; by Clintondale Trust raising the number of lots and potential resubdivision; by Irene Ross, raising the possibility the plan change might create 80 sections; by Marie C Saul raising whether OBDL would restrict the number of sections; by Matene Love, raising the increase in density of population; by Bruce and Jill Hearn, raising the potential for 80 sections; by Jeremy and Annie Ward, raising the number of residential sections the plan change would allow; by Michael John Milligan, opposing 30-40 sections; by Martin Elliot Loach, expressing concern about so many sections; and by Neville Saul, raising the large number of dwellings.

[40] Therefore we judge that the alteration to the plan change by adding an amendment to limit the number of dwellings to 41 would not broaden the plan change beyond the original limits, nor would it extend the change beyond what is reasonably and fairly to be understood from the content of submissions; nor would it prejudice anyone who failed to lodge a submission on the original request.

[41] The alteration to the plan change inserting a new amendment to Chapter 16 of the MSRMP (like the first alteration to amend Chapter 10) would limit an obligation to carry out flood mitigation works to the part of the subject land to be rezoned Sounds Residential that is affected by a flood hazard overlay. It is also a refinement of detail, because an obligation to carry out of flood mitigation works on parts of the land that have not been identified as being at hazard of flooding would be otiose.

[42] Four alterations to the plan change would amend Chapter 27 of the MSRMP. The first would repeat the limitation of the obligation to carry out flood mitigation works to land identified as being at hazard from flooding; and the second would repeat the limitation on the number of dwellings to a maximum of 41. Those alterations supply deficiencies in the original plan change, and for the reasons already given in respect of corresponding amendments to chapters 10 and 16, we accept OBDL's submission that they are minor and unprejudicial. The limitation on the number of dwellings is within the scope of the whole relief package of submissions on the plan change.

[43] The third amendment to Chapter 27 would refine a statement of likely consent conditions concerning access to the river bed for carrying out flood mitigation work. That refinement was requested by the MDC's rivers engineer in a submission on the plan change; and is plainly within the Court's jurisdiction to consider on this appeal.

[44] The fourth amendment to Chapter 27 would remedy an accidental omission by inserting the word 'reserve' after the word 'road' in relation to provision for parking of vehicles and boat trailers. The land to be vested for that purpose, not being used for through passage of vehicles, would be understood from the context as being road reserve; and the omission should be supplied for clarity.

[45] The new amendments to the planning map referred to by the MDC corresponds to the reduction in the piece of land to be rezoned. In the light of our finding about that reduction, the alteration to the amendment to the planning map is simply a consequential amendment.

Finding on Amendments to Plan Change

[46] We have found that the amendments to the plan change identified by MDC qualify in terms of the Court's jurisdiction to entertain amendments to a plan change declared by the High Court in *General Distributors*; or as minor corrections that would prejudice no one.

[47] Accordingly, we reject MDC's jurisdictional point, and find that the Court has jurisdiction to consider on its merits the plan change as amended.

Decision on the Merits

[48] Although several relevant issues were raised at the appeal hearing, in our opinion one of them is determinative of the appeal. That is, the effect the development which the plan change contemplates would have on the natural character of the coastal environment. That effect qualifies to be determinative by being identified through the various levels of the planning hierarchy, from Part 2 (being described by section 6 as a matter of national importance); by the New Zealand Coastal Policy Statement; by the Marlborough Regional Policy Statement; and by an objective of the MSRMP.

[49] On this question, differing opinions were given by two qualified landscape architects: Mr R M Langbridge and Ms E J Kidson.

[50] Mr Langbridge considered that the natural character values of the locality are moderate to low, due to land-use activities evident in the surrounding landscape, and the relative absence of natural patterns, particularly the vegetation patterns evident within the landscape. He remarked that natural character values are further compromised by the prominence of residential and marine industrial activities near the coast, and moorings visible in the bay.

[51] This witness considered that the plan change would identify the natural features of the valley, and would protect them, referring particularly to the low visibility of the site, its natural features, and natural boundaries which would contain development.

[52] Ms Kidson accepted that the natural character of the locality has been compromised by the existing development, but considered that this is not significant. She referred to the pastoral nature of the undeveloped valley floor subject to the plan change, and to the contrasting steeply-sloping valley sides, with remnant native forest in steep gullies, in a considerable area protected by a conservation covenant, and on the coastal margin. She gave her opinion that Oyster Bay has attractive rural attributes, and retains a natural character.

[53] This witness gave her opinion that residential development contemplated by the plan change would result in a landscape dominated by built form, which she described as over-domestication. She considered that the adverse cumulative effects would be significant.

[54] On the difference between those witnesses on whether Oyster Bay currently possesses natural character, we had the advantage of visiting the locality at the request of the parties, and in the presence of their appointed representatives. We viewed the bay from offshore, as well as traversing the land the subject of the plan change.

[55] From our observations, we accept that the natural character has been compromised to some extent by development of the existing dozen dwellings, by the electricity transmission lines, and by the modest development associated with commercial and recreational fishing. Even so, we find persuasive Ms Kidson's opinion

that Oyster Bay, including the subject land and its environs, still has a natural character worthy of the preservation and protection ordained by the Act and the applicable instruments under it.

[56] Rezoning the subject land Sounds Residential is intended, and would be likely, in time, to result in construction of up to 39 additional dwellings, with associated sealed roads, lighting, and so on. That loss of natural character would be cumulative on the adverse effects on that character by existing development and some further development already authorised. The outcome would be the establishment of Oyster Bay as a settlement. That would not give effect to the mandated preservation of the natural character, particularly in the coastal environment, nor its protection from inappropriate subdivision, use and development. Nor would it be appropriate to the natural form and environmental characteristics (especially the remaining natural character) of the area.

[57] There is no substantive justification in terms of the purpose of the RMA for changing the MSRMP despite non-compliance with those directions of the Act and planning instruments. No probative evidence tended to show any need for the development that the rezoning would facilitate. OBDL asserted that the current owners of part of the subject land are no longer able to adequately provide for their economic and social wellbeing from the current small farming unit, which does not have high quality soils.

[58] No doubt the landowners support the plan change because they hope to make more money from subdivision and development of the land than they could from activities contemplated by its current Rural zoning. There would be no point in the MSRMP prescribing zoning at all if that kind of argument would justify changing it. We do not accept that it justifies doing so, and agree with Mr Hawes's opinion that it would not be good planning practice to rezone further land, while there is still significant latent potential for residential subdivision and development in Port Underwood.

[59] OBDL also contended that it is appropriate that a plan change is pursued to ensure that future residential activities occur in accordance with objectives and policies for the zone rather than by separate land-use and subdivision applications. That argument begs the question whether any further residential development in Oyster Bay should be authorised at all. On the evidence before us it is not clear that any more should be authorised, whether by changing the zoning, or by consents ad hoc.

Outcome

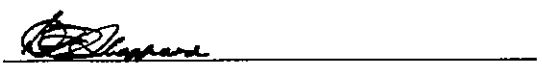
[60] The ultimate question in this appeal is whether changing the MSRMP as requested would more fully promote the sustainable management of the natural and physical resources of the site and its environs than would rejecting the change.

[61] In our judgement, the effect of the change would lead, in time, to development that would be incompatible with section 6(a) of the Act, applicable coastal and regional policies, and the relevant objective of the MSRMP, and would have an adverse cumulative effect on the natural character of the environment. Therefore we conclude that changing the MSRMP as requested would not more fully promote the sustainable management (as defined) of the natural and physical resources than would rejecting the change.

[62] Therefore the Court disallows the appeal; confirms the respondent's decision; and rejects the change requested.

[63] The question of costs is reserved. If agreement cannot be reached, any party may lodge and serve a written application for costs within 20 working days of the date of this decision, accompanied by affidavit evidence of any matters of fact (beyond the findings of this decision) on which the application is made. Any party against whom an order for costs is sought may lodge and serve written submissions in response within 20 working days of receipt of the application, and those submissions may similarly be accompanied by affidavit evidence. If necessary, a written reply may be lodged and served by the applying party within 10 working days of receipt of the response.

For the Court:



D F G Sheppard
Alternate Environment Court Judge