FOREST PRACTICES TRIBUNAL

PRIVATE TIMBER RESERVE – APPLICATION AND1372

BETWEEN

John Hayward	Appellant
AND	
Lynne Hayward	Appellant
AND	
Forest Practices Board	Respondent
AND	
Alan Andrews	Respondent

This was a hearing of an appeal against the approval of the Forest Practices Board of Private Timber Reserve application AND1372.

The appeal was heard in Launceston on the 8th and 9th of October 2002.

Mr B Chipman of Timber Communities Australia represented Mr A Andrews.

Mr G Wilkinson represented the Forest Practices Board.

Mr D Bower represented Private Forests Tasmania.

Mr J Hayward represented himself.

Mrs L Hayward represented herself.

DECISION

1. The appeals presently before this Tribunal for determination were brought by a married couple: John Hayward ("the Husband") and Lynn Hayward ("the Wife"). The appeals were against a decision of the Forest Practices Board ("the Board") to recommend the grant of status as a private timber reserve (PTR) to portion of an undeveloped allotment owned by Alan Andrews ("the Applicant"). The undeveloped allotment, comprised by two titles one of which is bisected by Kelly's Cage Rd, adjoined an allotment on which Andrews resides ("the residential allotment"). Both of those allotments are in Meander Municipality (MVC) and each had been the subject of an earlier determination by this Tribunal (as differently constituted).

2. Upon the hearing the parties were:
   a) the Appellants representing themselves;
   b) the Board, a statutory authority established under the Forest Practices Act 1985, represented by its Chief Forest Practices Officer;
   c) Private Forests Tasmania, a statutory authority established under the Private Forests Act 1994, represented by David Bower; and
   d) the Applicant, represented by Barry Chipman of Timber Communities Australia Ltd.

No party sought to be represented by a barrister or legal practitioner.

3. By a decision (AND 850B) of 7 September 2000, this Tribunal (as then constituted) had dismissed appeals by the Husband and MVC against a decision of the Board to recommend the grant of PTR status to Andrews in respect of the residential allotment. At the same time by a decision (MAC 1153) it also allowed an appeal by MVC, but dismissed an appeal by the Husband, against the decision of the Board to recommend the grant of private timber reserve status in respect of the entirety of the undeveloped allotment on an application brought by the then applicant, Mrs. McDonald.

4. In each case the Husband failed to satisfy the Tribunal that he, and by necessary inference Mrs Hayward, "would be directly and

materially disadvantaged if the application was granted" - that being the only ground of appeal open to him.

5. By a decision handed down two days after this Tribunal had embarked upon the hearing of the latter appeal, the Resource Management Planning and Appeals Tribunal ("RMPAT") dismissed an appeal by Mrs. McDonald against the refusal of Meander Valley Council (MVC) to grant to her a permit to conduct plantation forestry operations on the entirety of the undeveloped allotment.

6. Since the making of those determinations Andrews has purchased the undeveloped allotment from Mrs McDonald; and the Appellants have purchased the allotment on the western boundary of the residential allotment. Andrews wishes to devote the undeveloped allotment to plantation forestry under the protection, and subject to the obligations arising, from the application of the Forest Practices Act ("the Act). The Appellants wish to restore the native forest on their allotment and to commit it to being preserved as native forest for the benefit of posterity.

7. The responsibility of this Tribunal is to determine the appeals in accordance with the provisions enacted in the Forest Practices Act. In determining the appeals the Tribunal operates within the structures of a parliamentary democracy. By reason of legislation enacted by the Parliament, the Tribunal in determining appeals properly brought before it has a wide discretion as to matters of evidence and procedure and in these appeals it came to exercise those powers liberally - but not without restriction. But it has no power, authority or discretion to grant the relief sought by the Appellants unless they can establish that they are the owners of land that adjoins or is within 100 metres of the boundary of the proposed timber reserve (as to which there is no dispute); and that they "**would be directly and materially disadvantaged if the application was granted**" (emphasis added).

8. The Tribunal is satisfied that the Appellants are the owners of land on which they reside which land is within 100 metres of the boundary of the proposed private timber reserve on the undeveloped allotment, even though the properties are separated by the Meander River and are in different Municipalities.

9. It was common ground that both allotments of the Applicant are within a portion of Meander Municipality zoned as rural/residential; that, when originally proclaimed, the relevant planning scheme

prohibited forestry throughout that zone; but that by an amendment to the planning scheme forestry was made discretionary - as it had been before the adoption of the scheme - in relation to those two allotments in the zone and no others.

10. When Mrs. McDonald brought her appeals to RMPAT and this Tribunal her claims were opposed by MVC. Those proposals allowed no provision for any residential development on any portion of either allotment and both appeals were unsuccessful. Both RMPAT and this Tribunal upheld the submission from MVC that to allow the appeals would override legitimate planning policies which were the responsibility of MVC and for that and other reasons would be contrary to the public interest.

11. When the present application was first presented to the Board it sought approval for the dedication of 16.5 hectares out of the 18 hectares as a private timber reserve. The application was objected to by MVC and by the present Appellants. Negotiations were conducted (inter alia) by the Board with the Mayor and other representatives of MVC whereby it was proposed that in approving a forest practices plan for the reserve the Board would not permit forest operations on that portion of the undeveloped allotment with existing native forest; and would limit plantation development to seven hectares. The proposal was acceptable to the Applicant and at a meeting of MVC it resolved not to proceed with its objection. Objections from many owners from within the rural/residential zone were not heeded - a circumstance which may have explained the sometimes intrusive actions from observers of the proceedings of the Tribunal. No matter how unwise or undesirable the decision of the Council may have been, no evidence was presented suggesting that the decision taken in Council was unlawful.

12. On 20 March 2001, at a time at which the application was not considered by the Board to be substantially different to the earlier application of Mrs. McDonald, the Board wrote to Mrs. Hayward advising that it was likely to conduct a hearing in relation to the application - a necessary prerequisite to the refusal of any application. It was claimed that no such letter was forwarded to Mr. Hayward; that no hearing was held; that no notice was given to the Appellants that the Board had decided not to conduct a hearing; that the Appellants heard nothing more until they were belatedly advised that the application for the PTR had been recommended; that they were not advised at that time that agreement had been reached with the Applicant and MVC that utilisation of the PTR would be

restricted by the terms of the proposed forest practices plan; and that they had not been involved in those negotiations.

13. If the matters complained of in that regard by the Appellants be soundly based, as to which this Tribunal makes no finding, those failings and admissions had no substantially adverse effect for the Applicants because their time for appeal ran only from service of the notice of the decision of Board; and nothing relevant was excluded from consideration by this Tribunal. But if true, those matters gave the Appellants additional reasons to suppose they were not fairly dealt with. At the same time the Tribunal acknowledges that the intensity of feeling, at least as expressed by the Husband towards the Applicant, was such as to make it difficult - but not impossible - for the Board to involve the Appellants in negotiations with the Council and the Applicant.

14. At the hearing it was acknowledged that as yet no forest practices plan had been adopted by the Board; and contended that it would be within power for the Board to modify the proposal as to area or conditions from those proposed to MVC but, according to the evidence of the Chief Forest Practices Officer, not as to constitute the alteration a breach of its undertaking to MVC.

15. When the McDonald application came before this Tribunal (as then constituted) the Husband failed to establish to the satisfaction of the Tribunal that he, and by necessary inference his wife, would be "directly and materially disadvantaged by the granting of (PTR status") to the undeveloped land. Although the evidence presented by the Appellants failed in that respect it was in large measure relevant to the "public interest" questions contended for by MVC and which resulted in private timber reserves status being refused. In the present appeal, there being no other appellants, Mr. and Mrs. Hayward needed to present evidence relevant to the only ground of appeal open to them, namely, that they "would be directly and materially disadvantaged if the application was granted".

16. At the outset of the hearing the Chairman sought to make all persons concerned aware of both the extent, and of the limitations on the extent, of the powers of this Tribunal. In doing so it was emphasised that the Tribunal would make its decision on the evidence presented before it.

17. Prior to commencement of the hearing, one witness had given notice that as a former councillor of MVC, he intended to give evidence

criticising the conduct of MVC over many years, extending back to decisions as to the amendment of the original planning scheme. The notice did not disclose what that evidence might be. When the Husband presented that person as his first witness and introduced him by a question as to the length of his experience on MVC the Chairman ruled that evidence of the deliberations of MVC was not relevant to any question to be determined by the Tribunal.

18. Such were the protests from the Appellants and some observers that, after an adjournment and after conferring with all parties or their representatives, the Tribunal decided that, despite the ruling which had been made, it would allow the Appellants an opportunity to present much of the evidence whereby they hoped to establish to the satisfaction of the Tribunal sufficient facts to satisfy the critically important statutory test.

19. From the conduct of the hearing it was clear that both Appellants are implacably opposed to industrial plantation mono-culture forestry, especially in so far as it impacts on the amenity of the area in which they reside in Kentish Municipality and in nearby lands, albeit in Meander Municipality. However they expressed no objection to other forms of cultivation or agriculture. Nor had they objected to an application for PTR status for land in Kentish Municipality adjoining their residence. They explained that in that instance they had not objected because where they reside in Kentish is zoned "rural"; the proposed PTR was within that zone; forestry is a permissible activity; and they had been advised by officers from Kentish Municipality that in those circumstances it would be futile to object.

20. Although no planning scheme was put in evidence, it was not disputed that the undeveloped allotment is in Meander Municipality in the rural residential zone across the river from the home of the Appellants and through which they pass to effect movement to and from their residence.

21. The Appellants believe that forestry as currently practiced in Tasmania is detrimental to both the short and long-term interests of the State. They fear that forestry interests dominate in public affairs and unsound claims by the forest industries are not being effectively resisted. When it comes to relating their concerns to the protection of their particular interests they see, in the words of the husband, "wholesale political manipulation" by forest interests in respect of two properties: those of the Applicant. He characterised as

"extraordinary" the decision of the State Parliament to enact amendments (48 of 1998) to the Forest Practices Act to overcome the effect of a decision of the Supreme Court of Tasmania (The Queen v Pitt & Ors ex parte Meander Valley Council: Crawford J., 16 March 1998).

22. It is appropriate to record in outline concerns expressed by the Appellants. They are:

    a) That they were denied 'natural justice' when the planning scheme was amended to restore 'forestry' as a permissible use of the lands now owned by Andrews;
    b) That neither they nor any of the other residents in the rural residential zone were involved in negotiations by the Board with the Applicant or MVC. As to the former, having regard to the terms in which the Applicant was spoken of by the Husband and earlier history, that is not altogether surprising. As to the latter, it may be that MVC should have acted more prudently and communicated more effectively with the many objectors who were opposed to the application. But in a democratic society such problems are to be resolved within the electoral process or by reference to higher authority, such as the Minister for Local Government;
    c) If the reserve is established the Board might not give effect to its declared intention, as evidenced by the statements to the Tribunal of its Chief Forest Practices Officer asserting that the Board is bound to give effect to its undertakings as given to MVC - something not clearly confirmed, but not negated, by its evidenced formal resolution. The Tribunal acknowledges those concerns but is of the view, even if such concerns were established to be reasonably held, that does not give authority to uphold the appeal;
    d) The Applicant might not have the capacity to successfully manage the proposed plantation, together with all attendant responsibilities. The Tribunal notes that that concern to the Appellants is heightened by the evidence presented showing how little has been achieved by the Applicant on his residential property since PTR status was confirmed. Having said that the Tribunal is of the view that it has no power to allow the appeal by reason of any consideration of the fitness or capacity of the Applicant to manage a plantation;
    e) A related concern of the Appellants is whether the Board will ensure compliance with any standards it sets. The Tribunal makes no such finding, even as to whether the fear is

reasonably held. Such fear does not alter the issue which the Board must determine;

f) That Kelly's Cage road, which bisects the undeveloped allotment, will be used to cart harvested timber, not only from the lands of the Applicant, but also from other private timber reserves and State Forest in the area. Those forests and reserves are extensive. Some lie in Meander outside the rural residential area; some on land in Kentish adjoining the residential allotment of the Appellants and some in the State Forests lying to the South of the residence of the Appellants. Whatever foundation there may be for such fear - and the Tribunal makes no finding in that regard - the Tribunal determines that that risk is not significantly altered by any decision whether the undeveloped land has in whole or in part the status of a PTR;

g) That to grant the Applicant a PTR on the undeveloped land will lead to the abolition of the rural/residential zone within the existing planning scheme and, as a 'domino' effect, lead to the establishment of forestry on all or many of the allotments currently within the rural/residential zone. The Tribunal makes no finding as to that but rather observes that such questions will be determined by the appropriate processes if and when they arise; and

h) That there will be problems for wildlife with loss of habitat, use of inappropriate herbicides and pesticides - especially 1080 - siltation, and road safety problems. Such concerns are relevant only if they touch upon the statutory test as distinct from being concerns as to management decisions and practice.

23. The Tribunal concludes that none of the foregoing concerns, even if established as facts, constitute satisfaction of the statutory test: namely, that the applicants 'would be directly and materially disadvantaged if the application (for a PTR) is granted'.

24. To succeed the Appellants must establish each of the following elements of the statutory test. The Tribunal has no other authority to allow their appeals no matter how keenly the Appellants might wish that it did. Those elements are:

that they are "disadvantaged";

that the disadvantage arises from the granting of PTR status;

that the disadvantage arises "directly and materially".

25. As appears from the history of the residential allotment, granting status as a private timber reserve neither immediately nor necessarily results in any physical change in the usage of the property. However it does render all questions of utilisation of the property relating to forestry subject to the control of the Board. Detriment to the Appellants will only arise either because of action taken in development as a PTR or because that status, carrying with it - as it does - the prospect of development and Board control, a prospect which might thereby adversely affect the Appellants. The Tribunal takes into account the more liberal construction namely that it should have regard to the prospect of future development.

26. In construing the phrase “directly and materially disadvantaged” the Tribunal has had regard to several possible approaches. One is to consider the adverb “materially” in the sense of corporeal or physical. Another is to consider it in the sense of “to an important degree; considerably”. Similarly, “directly” might be considered in a causative sense (as in “ necessarily following upon and without any other operative cause”) or temporally (as in “without delay or immediately”).

27. Without purporting to determine authoritatively which of the possible interpretations is to be preferred, the Tribunal concludes that with one possible exception, none of the matters contended for by the Appellants constitutes such a disadvantage as satisfies the other elements of the statutory test.

28. Of all the matters raised by the Appellants, the possible exception is if granting the status sought will effect a reduction in the value of their residential allotment.

29. The belief of the Appellants is that it will. They hold that belief so firmly that they consider it to be self-evident. They sought to support their belief by producing a letter from two real estate sales-people which related to another property in another area at another time. But they did not call them as witnesses with the consequence that no one, neither other parties nor the Tribunal, could test their evidence. Mrs Hayward sought to explain the absence of any evidence from any qualified real estate valuer by asserting that no licensed valuer would be willing to give evidence against the interests of the forestry industry. That is a proposition which the Tribunal is not willing to accept.

30. Further support for the contention of loss in value was presented by the evidence of a highly qualified actuary whose evidence spoke critically of the economic significance of the forestry industry and who asserted a general depressive effect on the value of real estate in rural areas affected by forestry. As she did not claim any expertise or qualifications in valuing particular real estate, neither her evidence as to that nor any of her other assertions persuades the Tribunal that the addition of monoculture plantation timber on the undeveloped land having the status of a Private Timber Reserve will "directly and materially disadvantage the Appellants" by effecting a reduction in the value of their residential allotment over and above any reduction in value which would not already have been effected by the Private Timber Reserves which dominate the relevant areas in Meander and adjoining their own Kentish property and the State Forests to the south of their residential property.

31. One question raised by the Tribunal was whether it is empowered to modify the identification of land to be approved as a PTR or establish conditions relevant to its status as a PTR, such as the imposition of conditions of approval. In answer the Chief Forest Practices Officer of the Board contended that the Tribunal was obliged to limit its considerations to determination of the issue whether the Appellants had made out their ground of appeal. In consequence it was contended that the only powers of the Tribunal were to either allow or disallow the appeal. The Tribunal notes the contention but expresses no view as to its correctness. For the purposes of the present appeals, it suffices to say that the matter does not relate to the sole issue before the Tribunal: "…would (the Appellants) be directly and materially disadvantaged if the application was granted".

32. Having considered all of the representations made to it, the Tribunal is satisfied that most of the contentions of the Appellants were not relevant to the issue before the Tribunal; and that such evidence as was directed to relevant issues was not sufficient to persuade the Tribunal that the Appellants "would be directly and materially disadvantaged if the application was granted" and the recommendation of the Board for the grant of a PTR was to lead to the making of the recommended grant.

33. In consequence the appeal of each Appellant will be dismissed.

34. At the conclusion of the hearing leave was given to all parties to present applications for orders for the payment of "costs". Such

applications require that the Tribunal consider the exercise of its statutory power conferred by s. 37 (13) of the Act which provides that “The Tribunal may make such order for costs as it thinks necessary”.

35. Applications were received from the Applicant and Private Forests Tasmania.

36. The Applicant initially sought as “costs” $1,736.20 being compensation for travel; loss of income - time; research, consultation, photocopies, phone calls, faxes, postage and photos but did not make any claim for “direct income loss for myself being prevented from planting trees this season”. By a supplementary application he sought to recoup his application fee of $350 if the appeal was upheld and a further $1,295 being his ‘conservative estimate’ of his loss of income arising from delay in planting occasioned by the appeal. As the appeals have been dismissed, the claim to $350 needs no consideration. As to the balance of the entire claim neither details nor evidence in support were provided in relation to any element of the claim; and unless conceded as to quantum by those against whom the claim was made, an award would not be made without the Tribunal adjudicating as to quantum.

37. Private Forests Tasmania sought as “costs” $5,568.00 for the attendance of two staff at the hearing (2 staff for 2 days $2,475); and preparation and research (1 staff: one week $3,093) - total of $5,568. The latter item was said to comprise “Preparation of evidence for submission to Forest Practices Tribunal, review written material submitted by other witnesses/parties; prepare answering evidence; prepare presentation; prepare material for cross-examination of witnesses”. No other details and save that, as the Tribunal observed, two officers attended the hearing - of whom only one participated in the proceedings - no other evidence in support was provided in relation to any element of the claim. Unless conceded as to quantum by those against whom the claim was made, would not be made without an adjudication as to quantum.

38. In considering the exercise of that power the Tribunal has regard to:

    a) its past practice which has never resulted in the exercise of the power;
    b) the clear intent of the legislation that proceedings be informal: without professional legal representation as of right and, consequently, without professional legal representation as the

norm - despite the difficulties that causes for parties in interpreting statutes, identifying relevance, presenting evidence and questioning witnesses;

c) the administrative character of the proceedings as an element in public-decision making;

d) the status of the Board and Private Forests Tasmania as statutory authorities;

e) the fact that the appeal process does delay, but only to some moderate degree, the possible exercise of the rights conferred by the grant of PTR status;

f) the circumstance that there has to date been no substantial exercise of rights gained by the Applicant following on the decision AND 850B of 7 September 2000;

g) what proved to be the irrelevance of many of the contentions advanced by the Appellants;

h) the circumstance that the power is to be exercised in relation to "costs" rather than "expenses" and does not extend to providing for compensation by way of "damages" such as might have been awarded had any rights of the Applicant been infringed by a tortfeasor; and

i) the circumstance that the term "necessary" suggests a more restricted exercise of the power than would be conveyed by such terms as "reasonable" or "appropriate".

39. Having considered those factors, some of which point one way and others another, and the materials put before Tribunal Members by those seeking an order for costs, the Tribunal in the exercise of its discretion determines that no order as to costs shall be made in favour of any party.

Dated this thirty first day of October 2002.

Duncan W Grant	Peter M Roach	Rod J Pearse
Member	Chairman	Member