

# FOREST PRACTICES TRIBUNAL

## PRIVATE TIMBER RESERVE – APPLICATION AND850B

BETWEEN

Meander Valley Council		Appellant
	AND	
John Hayward		Appellant
	AND	
Mrs P. Finlay		Appellant
	AND	
Forest Practices Board		Respondent
	AND	
Alan James Andrews		Respondent

This was a hearing of an appeal against the approval of the Forest Practices Board of Private Timber Reserve Application AND850B.

The appeal was heard in Launceston on the 31/7/00 and 24/8/00.

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

Mr G Wilkinson represented the Forest Practices Board

Mr G Campbell represented Private Forests Tasmania

Mr R Jamieson and Mr T Eaton and (in part) S. McElwaine of Counsel  
represented Meander Valley Council

Mr J Hayward represented himself

Mrs P. Finlay represented herself.

## DECISION

1. The Tribunal as presently constituted was appointed pursuant to the provisions of the Forest Practices Act (FPAct) to hear and determine an appeal from a decision of the Forest Practices Board (the Board). The decision the subject of the appeal was made upon an application by Mr A J Andrews (the Owner) to have two portions of land (the Lands) owned by him (the Property) declared as Private Timber Reserves pursuant to the FPAct. Subject to the appeal presently before the Tribunal, the decision of the Board constituted a recommendation to the Governor that the Lands should be so declared: a recommendation upon which the Governor could make an appropriate declaration.
2. Upon such a declaration being made the Lands could be used only for establishing forests, or growing or harvesting timber in accordance with the Forest Practices Code (the Code) and such other activities which the Board considers to be compatible with establishing forests, or growing or harvesting timber (section 12(1) – FP Act).
3. The appeal has been conducted by way of re-hearing so that thereby all parties to the proceedings have had an opportunity to present their evidence, assertions and arguments. Being an appeal by way of re-hearing, it is to be decided according to the law in force at the date of the decision. (cf. *The Queen v. Pitt & Ors ex parte Meander Valley Council*: Crawford J. 16 March 1988).
4. The decision so referred to is of particular importance to the Owner because thereby the Court set aside a decision of this Tribunal differently constituted handed down on 10<sup>th</sup> November 1997. That decision had confirmed a decision of the Board recommending classification as Private Forest Reserves on the application of the Owner. The decision of the Tribunal was set aside for two reasons: an interpretation given to the concept of prohibition; and because the Tribunal had not had regard to the fact that between the dates of hearing (13<sup>th</sup> October 1997) and decision (10<sup>th</sup> November 1997), the relevant planning scheme had been amended to prohibit forestry on the lands in question. Both restrictions have since been overcome:

the former by statute; and the latter by amendment of the planning scheme.

5. The hearing of the present appeal immediately followed the hearing of an appeal against a decision of the Board made in favour of an adjoining owner of the Respondent (the prior appeal).
6. On the hearing of this appeal all those who had presented evidence and argument on the prior appeal (other than the adjoining owner last mentioned) adopted their earlier given evidence and arguments for the purposes of the present appeal and had an opportunity to supplement it. Those parties and witnesses who had not been so involved had an opportunity to present their evidence and arguments and to cross-examine all other persons who had earlier given evidence.
7. Upon the hearing the Tribunal received in evidence the written submissions made by the parties and a videotape of filmed material; and heard the evidence of representatives of the Board; Private Forests Tasmania; Timber Communities Australia; Meander; the Owner; Mrs Finlay; and of the Neighbour and his wife. All witnesses were cross-examined. To aid their understanding of the evidence, Tribunal members also viewed the lands within and surrounding the zone and the roads referred to in evidence and submissions.
8. The appeal comes before this Tribunal at the instance of three parties who had objected to the application to the FPB for approval of the property as a Private Timber Reserve. The appellants are Meander Valley Council (Meander); Mrs P. Finlay, a resident within the relevant zone whose property is within 100 metres of the Property; and John Hayward (“the Neighbour”), owner with his wife of (inter alia) an allotment also within 100 metres of the Property. The land on which the Neighbour and his wife reside is in the adjoining Municipality of Kentish but also adjoins the Mersey River which substantially defines the boundary between the two municipalities. Two of the residents within the relevant zone objected to the application to the Board but of those residents only Mrs Finlay appealed against its decision or gave evidence upon the hearing before this Tribunal.

9. Mrs Hayward, who had been an objector before the Board, thought herself to be an appellant but she had not lodged any notice of appeal with the Registrar of the Tribunal. Nonetheless she had full opportunity to be heard. Other parties to the appeal were the Respondent (the Owner); the Board; and Private Forests Tasmania (PFT) the body which had assessed the application and presented it to the Board for determination.
10. Upon the hearing Meander sought leave to be represented throughout the hearing by Counsel. Bearing in mind that no party is entitled to be represented by any legal practitioner; that no other party was to be represented by a legal practitioner; and that the Tribunal would be assisted by the benefit of well presented and relevant argument on the legal issues likely to arise, the Tribunal determined that the application for leave should be refused save that Counsel could present argument to the Tribunal on the legal issues involved. Submissions, both written and oral, were received from all concerned.
11. With the parties appearing being unrepresented by legal practitioners and having limited experience in presenting evidence and in the examination of witnesses, they and their witnesses were allowed substantial liberty in the presentation of their assertions and arguments. The rules of evidence were not invoked and only some of the more irrelevant assertions were excluded from consideration.
12. In closing argument for the Owner his representative presented a written submission by the Owner. It sought to raise issues not raised when he gave evidence and not raised in cross-examination of others when it would have been appropriate to do so. The Tribunal makes no findings adverse to any other person by reason of those belated allegations.
13. The Lands of the Owner recommended in November 1999 by the Board for approval as Private Timber Reserves form part of the Property purchased by the Respondent in 1975. He resides there with his wife and child. Classification as Private Timber Reserves was sought in relation to two parcels comprising in all 18.5 hectares ("the Lands") out of 21.19 hectares (the Property). The site of the residence and of a proposed orchard separates the two parcels. The Property lies within the Municipality of Meander Valley and it stands within a restricted residential zone defined by the Meander

Planning Scheme (“the Scheme”) as “Residential Low Density”. For the greater part of its eastern boundary it is separated from the adjoining Rural Zone only by the property the subject of the prior appeal. For the balance of that boundary it is on the perimeter of the Rural zone.

14. Forestry is a permitted use on lands in the Rural Zone (as defined by the Scheme) and plantation forestry operations are being carried out up to the boundary with the relevant zone. Those lands have been declared to be a Private Timber Reserve.
15. Meander is primarily a rural municipality comprising some 3,600 square kilometres of which c. 90% is zoned Rural. Another zoning classification is Residential Low Density. The latter classification embraces some 2.5% of the municipality in thirteen areas. The Property is within one such area (the zone) which comprises some eighteen allotments. In relation to the Residential Low Density zone the scheme declares the intent of the zone to be “to provide principally for low density residential use and development and to further policies which aim to ensure that the amenity, health, and well being of residents is enhanced or protected”. It goes on to provide that zone policies are (inter alia) “(1) to protect the amenity of land for residential use and development; (2) to encourage use and development which contribute to the natural and cultural resources that determine the character of the landscape”. The zone has been developed in accordance with those objectives and for the most part comprises single residences on large allotments – commonly of the order of 20 hectares. As many as thirteen allotments may have been developed with single residences in accordance with current Council policy of permitting only one residence per allotment. Forestry, defined by the Scheme as “establishing, managing or harvesting of trees” is classified, subject to two exceptions, as “prohibited” (in the terms of the Scheme) throughout the zone. The exceptions are that forestry is classified for the allotment of the Owner and one other adjoining allotment as a discretionary activity which, so long as the land is subject to the Scheme, may be undertaken with the leave of Meander but not otherwise.
16. The evidence establishes to the satisfaction of the Tribunal that the Property has been cleared of native forest in days past and used for

primary production (other than forestry); that the Owner is limited in his capacity to work the Property by physical disability and limitations of finance; that earlier efforts have had very limited success; and that, particularly having regard to the physical and financial circumstances of the Owner, it is not well suited for further development for agricultural purposes. The Owner sees establishment of eucalypt plantations as the best course open to him in order to make provision for his family.

17. For several years he has wanted to establish eucalypt plantations on the Lands while residing on the Property – with all operations on the Lands to be subject to the provisions of the Forest Practice Code (“the Code”).
18. The Tribunal inspected the site of the Property and the general area within which the zone falls. That inspection of the area, together with the evidence of witnesses, showed that the Property is serviced by single lane, narrow, well surfaced roads in good condition and well maintained; old wooden bridges and culverts - but with limited relevance to the proposed development; residential development past and present of varying quality; some abandoned fields and home sites; old growth forests showing evidence of past logging; re-growth forests, some of which are of long-standing; and areas formerly committed to agriculture which are being slowly reclaimed as forest being either at an early stage of reclamation by weeds and the like or at the more advanced stage with clumps of wattle with varying years of growth.
19. The evidence established that Meander has recently restricted the load limits over the culvert on Kelly’s Cage Rd. to ten tonnes; that permits allowing the carriage of greater loads may be granted by Meander; that in recent years as much as 13,000 tonnes of timber has been carried over portions of the same roads by Boral without causing any accidents or doing extensive damage to the roads; that commonly forestry companies contribute significantly to costs to be incurred by councils in up-grading roads to make them better suited for use by laden log trucks; and that no arrangements to such effect have been made in relation to usage to be generated through forestry activities on the Property either in the near or distant future.
20. The Tribunal finds that such lands in the zone as have been cleared had earlier been forested. Today the allotments throughout the zone

comprise substantial pockets of cleared lands, commonly with residential development, within a broader area substantially committed by nature or man to the growth of trees.

21. By the provisions of the FPAct, Parliament has determined that:
  - i) Classification of lands as Private Timber Reserves is consequent upon a recommendation of the Forest Practices Board;
  - ii) Applications are to be refused by the Board if it is satisfied that:
    - a) the application has not been made in good faith and honestly;
    - b) the land is not suitable for declaration as a Private Timber Reserve;
    - c) any person having a legal or equitable interest in the land or the timber would be disadvantaged;
    - d) any Act prohibits establishment of forests or growing or harvesting timber;
    - e) it would not be in the public interest to grant the application; or
    - f) a prescribed person (defined to include a person such as the Neighbour) would be “directly and materially disadvantaged” if the application was granted. (Section 8 (2) FP Act).

Section 20(7) of the Land Use Planning and Approvals Act (LUPA Act) provides (inter alia) that “Nothing in any planning scheme or interim order affects (a) the management of land declared as a private timber reserve under the Forest Practices Act 1985;...’

22. An appeal from the decision of the Board lies to this Tribunal but only at the instance of eligible persons as determined by the Act and only on grounds specified in relation to each class of appellant. The Tribunal is to be constituted by a Chairman and two others appointed to membership by reason of specialist qualifications; and objections to the members nominated to sit upon an appeal are to be determined by the Chief Chairman. An objection by the Neighbour was so determined in this instance.
23. Upon the hearing of an appeal it is the satisfaction of the Tribunal, and not that of the Board, which will determine the outcome of the appeal.
24. The Tribunal is satisfied that the application was made in good faith and honestly; that the land is suitable for declaration as a Private Timber reserve; and that no person having a legal or equitable

interest in the land will be disadvantaged by the granting of the application.

25. The relevant grounds for disallowance relied on during the hearing were that approval was not in the public interest; and that “a prescribed person”, being the Neighbour, would be “directly and materially disadvantaged” by the development.
26. Meander, as the local authority in relation to the Property and thereby an eligible appellant, objected on the ground that it would not be in the public interest to grant the application. In addition in its objection Meander stated “A Private Timber Reserve removes the land from Council’s consideration in the public interest with respect to all forestry operations. THP ‘consultation’ is not sufficient. A Planning Approval has not been issued by Council.” There was no objection by Meander, such as there was by the Neighbour, that forestry, and especially “woodchipping”, was always and everywhere contrary to the public interest.
27. The Neighbour and his wife objected initially specifying “details of disadvantage” in which they stated (inter alia) “The introduction of forestry into this residential area will substantially lower the market value of neighbouring properties, as has been the case with similar situations elsewhere”. They also referred to danger to pets through poisoning by use of 1080; distress to residents occasioned by the cruelty of poisoning; increased siltation and eutrophication; residual herbicides being a real threat to health and an ongoing source of anxiety to residents; and “the perception and the reality” of the decision making process being “corruptly captured by commercial interests” being “inimical to the economic, social, and environmental interests of the great majority of Tasmanians”.
28. As to the latter contention, members of this Tribunal can do no more than record that they do not consider themselves to be acting at the direction of “commercial interests” or to be “captured” by such interests, whether “corruptly” or otherwise. The appeal will be decided on its merits in accordance with the directions of the Parliament as expressed in the legislation. By those standards it is the responsibility of the Tribunal to allow the appeal if it is satisfied that any relevant grounds of appeal relied on by any Appellant are made out.

29. In her evidence Mrs Hayward, wife of the Neighbour, presented her assertions forcefully, clearly and succinctly. They were:  
“that forestry is totally inappropriate in this area in that it would cause a severe road safety hazard for residents;  
that forestry in this area will severely affect its residential amenity and consequently property values;  
that forestry inflicts a net economic loss on taxpayers, the local council and residents;  
that forestry represents an unsound investment from the point of view of the investor;  
that any planning discretion should properly reside with council and not with a forestry industry body such as the Forest Practices Board”.
30. To have plantation forestry follow a declaration of the Property as a Private Timber Reserve will commit the property to a development conforming to the principal use of lands in the area surrounding the Restricted Residential Zone but not throughout the cleared lands which are dominant within the area of the Restricted Residential Zone. Such development, if undertaken, will alter the visual amenity for some residing in the neighbourhood, including the Neighbour and Mrs Hayward, as they observe the area from their properties and also alter the visual amenity for persons travelling through the area, whether they reside in the neighbourhood or not. The Tribunal is not persuaded that any such loss of amenity will occasion direct and material loss to any person.
31. It was obviously a matter of concern to the Neighbour that the lands of the Owner and one other person within the zone came to be so classified under the Planning Scheme that forestry was a discretionary use if approved by Meander. Equally it was a matter of concern to the Respondent, particularly having regard to his physical disabilities and financial limitations and what he saw, rightly or wrongly, as the affluence of the Neighbour and Mrs Hayward, that what was at issue was his claim to use his land at his own risk and expense as he wished and as he could have done as of right prior to the introduction of any planning scheme and as a result of the decision of this Tribunal of November 1997 had it not been quashed by Order of the Supreme Court of Tasmania because of an amendment to the planning scheme of Meander – an amendment later set aside.

32. The Tribunal observes that it is in the nature of planning schemes that the rights of property owners may be enlarged or restricted, and the values of property increased or reduced, by the adoption of planning schemes and by decisions made by municipal authorities responsible for the administration of planning schemes. In the circumstances a brief explanation of scheme changes relevant to the zone and the lands of the Owner is appropriate.
33. At the time the Owner first purchased the Property, forestry was an allowable use of the lands as of right. In 1990 when a Planning Scheme was first adopted for the municipality (as it then was), forestry came to be classified as a discretionary use. To that extent his rights as Owner, along with the rights of all other affected owners, were restricted. When the current Planning Scheme was first propounded that discretionary classification was again proposed. However, when the Planning Scheme was formally adopted, forestry came to be a prohibited activity throughout the Residential Low Density Zone in question. That led to the quashing of the earlier decision of this Tribunal. In due course the Resource Planning and Development Commission (“the Commission”) directed Meander to amend its plan so as to make forestry, subject to the approval of Meander or the Planning Appeals Tribunal, a permissible use of the lands within the zone of the Owner and one other neighbour. From his point of view it would have been ‘better’ that the boundaries of the zone had been redefined to place the Property within the Rural Zone which it in part adjoined. That did not happen.
34. Being opposed to the amendment of the Scheme making forestry permissible on two allotments within the zone, the Neighbour became prosecutor in proceedings brought in the Supreme Court of Tasmania seeking to quash the decision of Meander to approve the amendment.
35. The claim was based upon allegations of apparent bias in the decision-making process and/or a denial of natural justice by reason of a defective report of the hearing conducted by delegates of the Commission. The hearing of the present appeal was deferred pending a determination in those proceedings. On the decision dismissing the application being handing down by Underwood J. on 4 May 2000 (R. v. The Resource Planning & Development

Commission: ex parte Hayward [2000] TASSC 40), steps were then taken which led to the hearing before us.

36. At the hearing the Neighbour presented an extensive critique of the reasons for decision of His Honour Mr. Justice Underwood. As it has no authority to do so and any observations it made would be impertinent and of no significance, the Tribunal declines to undertake that review.
37. The Neighbour and his wife both presented extensive criticisms of legislative policy and practice in relation to forest management in Tasmania. Such criticisms are not relevant to the issues to be determined and the Tribunal says nothing about them. It confines its attention to the submissions relevant to the determination of the appeal.
38. In support of the contention that there would be “direct and material disadvantage” to the Neighbour and his wife, they asserted that establishment of a Private Timber Reserve on the Property would cause a substantial fall in the value of their residential property. They produced clippings from the Press and a letter from estate agents speaking of falls in value in other areas of the State by reason of establishment of forestry operations. Such assertions by persons not presented as witnesses and not available for examination by others or assessment by the Tribunal, and relating as they do to other times and other places, are of little assistance. Nothing in those assertions or material or in any of the other matters complained of by them persuades the Tribunal that there will be any “direct and material disadvantage” to the Neighbour and his wife. The ground of appeal, being the only ground available to the Neighbour, is not made out. In consequence the appeal of the Neighbour fails.
39. Mrs Finlay’s objections were substantially in support of the residential character and amenity of the zone with particular emphasis on the recreational use of the river and its surrounds by visitors. She did not allege, and did not claim to have established that any “direct and material disadvantage” would flow if the appeal were dismissed. That being so, her appeal must fail and the Tribunal so holds. However, her evidence remains material in relation to the appeal of Meander.

40. As to the appeal of Meander, the Tribunal must assess whether the recommendation for a Private Timber Reserve on most of the Property is contrary to the public interest.
41. In evidence much was made of concerns of the Council as to maintenance, use and safety of its roads. The Tribunal is not persuaded that the problems with road usage are such that they could not be overcome in relation to such usage as can be envisaged in the near future which is limited to establishment of the plantations. After all Meander is responsible to all of its ratepayers and residents, and not only to those opposed to forestry operations. At the same time the Tribunal recognises that control and regulation of the use of public roads is primarily a matter for the Council; and is likely to remain so in the long-term. By the time harvesting of trees yet to be planted is appropriate, circumstances may be quite different to those now existing. Further, the declaration of land as a Private Forest Reserve does not impose any obligations on Council or confer any entitlements on others to the use of public roads overriding the responsibilities of Councils. If timber cannot be lawfully removed from a Private Timber Reserve, that is a risk for the developer. Yet that risk is not of itself a sufficient reason for refusing an application for classification as a Private Timber Reserve.
42. However there is a matter of public interest a decision as to which will determine whether the recommendation of the Board will be allowed to stand.
43. The Residential Low Density Zone is an area which lies in a valley surrounded by forests. In times past it was substantially cleared of timber and at the time of proclamation of the present Scheme it was primarily a residential area characterised by allotments of some 20 hectares or so most of which were developed as residential properties. The allotment of the Owner is one such property. In performance of its responsibility to provide for the good order and government of the municipality Council determined that the zone should permanently retain that residential character. By the Planning Scheme it defined the area of the zone and the characteristics of that area. It has a proper concern to maintain the integrity of its Planning Scheme. By its terms forestry was to be a discretionary use of the lands of the Respondent and of one of his neighbours. Among other things, what the Council objected to in relation to the application of the Respondent for permission to undertake forestry was that,

although developed and occupied as a family residence, the proposal embraced two substantial portions of the Property occupying over 85% of the Property.

44. In reaching its decision the Tribunal is conscious that, if established as Private Timber Reserves, management of the sites will primarily be the responsibility of the Board: a responsibility which must be discharged in accordance with the provisions of the FPAAct and the Code. Section 17(4) of the FPAAct obliges persons proposing to establish forests to secure certification of a forest practices plan by the Board. In that process the Board may require additions or amendments (S.19(1)(c)). The FPAAct vests substantial powers and discretions in the Board and it is not to be presumed that they will be unreasonably exercised. As the FPAAct provides in a Schedule: “the objective of the States’ forest practices system is to achieve sustainable management of Crown and private forests with due care for the environment.....”. Moreover there are the provisions of the Forest Practices Code to regulate forestry. That Code is under constant review and is revised from time to time. The Tribunal is satisfied that it is a policy of the Board that the “public interest” should be taken into account in its decision making and that the Board accepts “The rights of local communities to have (their) concerns (taken) into account”. The Tribunal also accepts that the declaration of a Private Timber reserve over some 85% of the Property is for planning purposes only and neither requires nor implies that the whole area will be planted with trees.
45. That being so the Tribunal is of opinion that sensitive planning of forest operations involving harvesting of any existing timber; selection of suitable species for the plantations; the fixing of set backs from natural features such as the Mersey River; provision for the retention of some vistas; and preservation of open areas on the verges of the river will be appropriately provided for in the Forest Practices Plan.
46. Having so concluded the decision of the Tribunal is that the appeal of Meander is also dismissed.
47. The Tribunal will entertain any application for an order for costs in this appeal if made to the Tribunal in writing with supporting submissions within the next fourteen days. Copies of any submissions to the Tribunal should also be circulated at the same

time to the other parties. The Tribunal will proceed to the determination of any such application in such manner as then appears appropriate.

48. In the absence of any such application for an order for costs the order of the Tribunal is that each party shall bear its own costs.

Dated this ..... Day of September 2000

Bernard B Walker  
(Member)

Peter M Roach  
Chairman

Duncan W Grant  
(Member)