ORIGINAL

Decision No: C 43 /99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a reference under Clause 14 of the First Schedule to the Act

**BETWEEN** **CBD DEVELOPMENT GROUP**

**RMA: 510/98**

**TIMARU BUSINESS ASSOCIATION**

**RMA: 511/98**

**Appellants**

**AND** **TIMARU DISTRICT COUNCIL**

**Respondent**

**BEFORE THE ENVIRONMENT COURT**

Environment Judge J R Jackson sitting alone under section 279 of the Act

**HEARING** at **TIMARU** on Friday 19 March 1999

**APPEARANCES**

C E Robinson for Countdown Properties (Northlands) Ltd
J L D Wallace for CBD Development Group
N J Scott for Timaru City Council

## DECISION ON INTERLOCUTORY APPLICATION TO STRIKE OUT PART OF A REFERENCE

### *Introduction*

1. Countdown Properties (Northlands) Ltd was a submitter on the Timaru District Plan. It has changed its name to Progressive Enterprises Ltd ("Progressive"). Progressive owns land south of North Street in Timaru which the Timaru City Council ("the Council") proposed to zone "Industrial L" as shown on planning map U.17 in the proposed plan as notified by the Council. The two appellants, who were cross-submitters on the Progressive submission, lodged appeals against the Council's decision. Progressive has filed a section 271A notice in each proceeding and is thus a party to both. Progressive has applied to the Court under section 279(4) of the Resource Management Act 1991 ("the RMA") to strike out part of two identical references by the two appellants (called "the Association" and "the Group" appropriately).

### *Background*

2. In its submission[1] on the Council's proposed district plan ("the plan") Progressive requested as relief:

> *"i That sentence 5 and 6 of the Explanation and Principal Reason (Page 184) for Policy 3.1.2.1 relating to Commercial Zones be deleted.*
>
> *ii That either the area zoned Industrial L between North and Browne Streets, west of Stafford Street, be rezoned Commercial 1B and Planning Map U17 altered accordingly; or,*

[1] Under clause 6 of the First Schedule to the RMA

*iii a provision be included in the Rules for the Industrial L zone to allow for large scale retail activities;*

*or,*

*iv that Planning Map U17 be amended to zone the Countdown and Warehouse sites as Commercial 1B."*

I note that relief (iv) is effectively a subset of relief (ii): it simply asks for Commercial 1B zoning over a smaller area.

3. In their identical submissions under clause 8 of the First Schedule to the RMA, the Association and the Group each opposed the Progressive submission in the following terms:

> *"2. The particular parts of the submission I* ***oppose*** *are ...71/5. Either amend the area zoned Industrial L on Map U17 between North and Browne Streets, west Stafford Street by extending the Commercial 1B to include this area; or amend the Commercial 1B zone to include: Lot 1 DP 28841, Lots 1-4 DP 9331, Lots 7-8 DP 6833, TS 401-404 and 414-527/6 and Lots 1 and 2 DP 45482, Lot 2 DP 20246, TS 181, 182 and 183, Part TW 178 and 179 Lots 1 and DP 13080 (the Countdown and Warehouse sites between Heaton and Browne Streets on either side of Victoria Street)."*
> (My emphasis).

The key word in that quotation is *'oppose'*: the rest of the quotation is a description of what is opposed. The effect of the submissions seems to be that the appellants wanted the existing Industrial L zoning retained.

4. In its decision on the submissions the Council stated:

*"THAT submission 71/5 by Countdown Properties Northlands Limited seeking to rezone land between North and Browne Streets west of Stafford Street, or at least the Countdown /Warehouse sites to Commercial 1B be accepted in part to the extent that a new Commercial 1C Zone is established and that the area between North and Browne Streets, west of Stafford Street, be zoned Commercial 1C, and that further submission 667/6 by the Timaru Business Association and 527/6 by the Central Business District Development Group opposing that submission be rejected."*

At first sight the decision looks rather mysterious since there was no Commercial 1C zone in the proposed plan as notified. Progressive had sought a rezoning for Industrial L to Commercial 1B, and the appellants wanted the status quo to remain. The Council did something else again: it invented a new Commercial 1C zone, with largely the same rules, standards and permitted activities as in the Commercial 1B zone except that only shops with a floor area of more than 500m$^2$ are permitted.

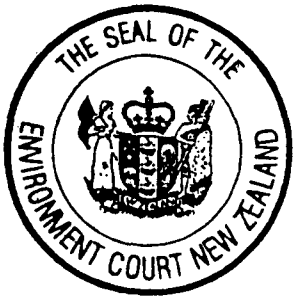
5. The Association and the Group were not happy with that outcome. In their reasons for their references they each state:

*"The floor area used to define larger shops, being 500 square metres, is far too small to provide any real protection for the Central Business District."*

They each seek the following relief from the Environment Court:

*"6. Relief Sought:*

*(i) The deletion of the Heaton/Browne Street area from Commercial C1.*



*(ii) The redefinition of that area as Commercial C2 which would allow shops larger than 2,000 square metres with no exceptions.*

*(iii) Subject to the foregoing the provisions relating to Commercial C1 to apply to Commercial D."*

The reference to a "Commercial C1" zone is wrong; it should refer to "Commercial 1C".

***Consideration of Striking Out Application***

6. Progressive now seeks to strike out paragraphs (ii) and (iii) from the references on the grounds that they go beyond the relief sought by the appellants in their submissions. Ms Robinson's argument was:

(a) each submission, being a "cross-submission" under clause 8 of the First Schedule to the RMA can only be in support of, or in this case, opposition to the Progressive submission (under clause 6);

(b) the Progressive submission contained four parts[2];

(c) the Association only submitted on, that is opposed, the relief in Progressive's relief (ii) seeking a rezoning to Commercial 1B;

(d) the only reference to retail activity sizes in Progressive's submission is in relief (iii) which refers to "large scale retail activities";

(e) since neither the Association nor the Group made any cross-submission on Progressive's relief (iii) it cannot seek to change the definition of large scale retail activities by amending the floor area from 500m$^2$ to 2,000m$^2$.



[2] See paragraph 2 above

7. At first sight that argument had some force, but I must look at the references in the light of all the facts. The most obviously relevant matter is, as pointed out above, that the Council decision did not follow either Progressive's submission or the Association's cross-submission but compromised between them. I respectfully adopt the approach of the Full Court in ***Countdown Properties Ltd v Dunedin City Council***[3] when it stated:

> *"Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that councils need scope to deal with the realities of the situation. To take a legalistic view that a council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the council in its decision."*

8. Of course the issue I am asked to decide today is not whether the Council's decision was within the scope of the submissions, but whether the references by the Association are valid. Clause 14(1) of the First Schedule to the RMA controls the making of references to the Environment Court. It states:

> *"(1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court*
>
> *(a) Any provision included in the proposed policy*



[3] [1994] NZRMA 145 at 165

*statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or*

*(b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan,*

*if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan."*

The important aspect of clause 14(1) for present purposes is that there is a condition precedent to any persons referring a provision in (or an exclusion from) the proposed plan[4] to the Environment Court which is that the referrer must have referred to the provision (or matter excluded) in their submission (or cross-submission[5]).

9. Ms Robinson submitted that in this case the appellants' references did not satisfy the requirements of clause 14. In particular the Association had referred a rule in the proposed Commercial 1C zone to the Court, when it made no express reference to such a rule in its submission.

10. Clause 14 makes it clear that a provision included in a proposed plan (or an excluded matter) must have been referred to in an aspiring referrer's own submission. There is no definition in section 3 (or elsewhere) of "provision" (or "matter") of the RMA. I hold that those terms must be interpreted generously and pragmatically because this issue is subordinate to the key issue as to whether a local authority's decision is



4 As decided by the Council
5 The definition of "submission" in section 2 RMA includes 'cross-submissions'

reasonably within the ambit of the submissions[6]. A local authority's decision may:

(1) compromise between -

(a) the proposed plan as notified;

(b) an original submission (under clause 6);

(c) any cross-submission (under clause 8); and

(2) impose new rules (and probably new objectives and policies) not mentioned in any of these documents.

11. It is a question of degree in each case as to whether the local authority can make amendments not specifically sought by submissions: ***Whitford Residents and Ratepayers Association (Inc) v Manukau City Council***[7]***; Countdown***[8]. Beyond those limits a variation (under clause 16A of the First Schedule) is necessary: ***Telecom NZ Ltd v Westland District Council***[9].

12. I hold that it is sufficient for the purposes of clause 14 that the relevant rules (zonings and/or maps) as notified are referred to by the referrer. The referrer need only refer to what is excluded. The reason for that is that it is impossible for any submitter (not a clairvoyant) to refer specifically to rules still to be invented by a local authority. There is a distinction between the matters which the referrer must raise under clause 14 to establish jurisdiction, and the relief the referrer may seek. The relevant form[10] for a reference to the Environment Court is required to contain both a paragraph[11] identifying the provision included or

---

6 ***Countdown Properties Ltd v Dunedin City Council*** [1994] NZRMA p.145 and 164-167 ***Royal Forest & Bird Protection Society v Southland District Council*** [1998] NZRMA 408

7 [1974] 2 NZLR 340

8 [1994] NZRMA 145

9 Decision C104/97

10 Form 4 of the Resource Management (Forms) Regulations 1991

11 Paragraph 4 of Form 4

matter excluded which is referred to the Court and a paragraph identifying the relief sought[12].

13. Ms Robinson referred to several cases where references have been struck out. In ***Hilder v Otago Regional Council***[13] there was a chapter about noise in the proposed regional plan which stated:

> *"There are no rules within this chapter. The objective and policies contained within this chapter give guidance to the consideration of activities that require resource consents under any or all of the other chapters of this plan."*

There were no submissions under clause 6 of the First Schedule objecting to the lack of rules. Mr Hilder sought, on a cross-submission[14] to introduce a rule controlling noise. The Environment Court after considering the scheme of the First Schedule held that Mr Hilder could not raise the issue of a new rule in a cross-submission, and struck out his reference.

14. In ***Telecom NZ Ltd v Waikato District Council***[15] the proposed district plan as notified provided that underground cables and lines for telecommunication facilities were to be permitted activities in all zones. It was unclear whether that included special landscape, coastal and ridgeline "Policy Areas", so Telecom submitted cables and lines should be permitted in those areas. Ms Webster cross-submitted:

> *"The reason for this OBJECTION is that this be non-complying. And further that this policy would appear to be 'ultra vires'."*

---

12 Paragraph 6 of Form 4
13 Decision C122/97 at p.2
14 Under clause 8
15 Decision A74/97

After a hearing the Waikato District Council decided to amend its proposed plan by making underground telecommunication lines controlled or discretionary activities in the policy areas. Telecom appealed partly on the ground that the Council's decision was beyond its powers. Ms Webster gave notice that she wished to be heard. The issue for the Court was as to the scope of the appeal - in particular could Ms Webster argue that Telecom facilities should be made a non-complying activity. The Court held that:

> *"It was not open to Ms Webster to seek, by her further submission in opposition to the appellant's submission, that underground cables and lines for telecommunication facilities not be permitted activities in any zone. It is not clear from the language of Ms Webster's submission (quoted above) that this is what she was seeking. However the other parties have gathered from the evidence that she gave at the hearing by the respondent's committee that this is what she was seeking. To be entitled to seek that, Ms Webster would have had to lodge her own original submission seeking that relief, and she did not do so."*

15. This case can be distinguished from ***Hilder*** and ***Telecom NZ Ltd.*** Those cases appear to be more about whether the relief sought was fairly and reasonably within the scope of submissions (it was not), whereas in this case that issue has not been raised.

16. The question in this case is simply whether the identification pre-condition of clause 14 has been complied with by the Association and the Group. I hold that it has by the appellants, in their cross-submissions, each referring to both the Map U17 and the fact that they opposed the rezoning of the relevant land from Industrial L to

Commercial 1B. That matter was excluded by the Council in its decision and has been identified in the references. As for relief: while strictly I do not have to decide the matter, it appears to me that the appellants can in their references seek reinstatement of the industrial zoning or (as Mr Wallace submitted) something lesser but between an industrial zoning and a Commercial 1C zoning without going beyond the rights conferred by clause 14.

***Outcome***

17. Consequently the application is refused. The references may stand in their entirety so that they can be heard as to their merits. Costs are reserved.

**DATED** at **CHRISTCHURCH** this 31st day of **April** 1999.

**J R Jackson**
**Environment Judge**

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND