

IN THE ENVIRONMENT COURT
AUCKLAND

ENV

IN THE MATTER

of the Resource Management Act 1991 ("Act")

AND

IN THE MATTER

of Clause 14(1) of the First Schedule of the Act.

BETWEEN

PROGRESSIVE ENTERPRISES LIMITED

Appellant

AND

AUCKLAND CITY COUNCIL

Respondent

NOTICE OF APPEAL TO ENVIRONMENT COURT

24 JULY 2009

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1. INTRODUCTION

- 1.1 Progressive Enterprises Limited ("**Progressive**") appeals against part of a decision by the Auckland City Council ("**Council**") on the Proposed Hauraki Gulf Islands District Plan ("**Proposed Plan**").
- 1.2 Progressive made a submission on the Proposed Plan on 11 December 2006, and made further submissions on the Proposed Plan on 28 May 2007.
- 1.3 Notice of the Council's decision ("**Decision**") was received on 2 May 2009. The Decision approved the Proposed Plan with modifications.
- 1.4 The parts of the Decision being appealed are:
 - (a) Table 10a.12.5 - Activity Status for constructing and altering buildings.
 - (b) Clause 11.5.3.4 Commercial 1 and 2 - Design criteria.
 - (c) Clause 10a.12.3.2 Objective - Design and safety outcomes.
 - (d) Table 10c.2 Development controls: commercial 1-7 - Height limit.
 - (e) Table 10c.2 Development controls: commercial 1-7 - Earthworks permitted.
 - (f) Table 10c.2 Development controls: commercial 1-7 - Noise Levels.

2. GENERAL SUBMISSION

Reasons for appeal

- 2.1 Progressive develops and operates supermarkets throughout New Zealand including the Countdown, Foodtown, Woolworths and Pricechopper supermarkets. Progressive currently operates only one supermarket on Waiheke, a popular and profitable Woolworths supermarket on Ostend Road.
- 2.2 Prior to notification of the Proposed Plan, Progressive acquired an interest in a site at 13-19 Belgium Street near the centre of Ostend Village ("**Site**"). Belgium Street is a predominant street running through the centre of Ostend Village. It is an ideal location for a supermarket. Progressive intends to develop the Site, and construct larger supermarket to continue to provide for the growing needs of the Ostend village and wider Waiheke Island community.
- 2.3 The notified version of the Proposed Plan provided for commercial buildings as a restricted discretionary activity, with fully discretionary activity status triggered by non-compliance with any of the development controls. Effectively, any supermarket development on

Progressive's Site would fall to be considered as a fully discretionary activity under the Proposed Plan as notified.

- 2.4 Progressive lodged a submission on the Proposed Plan seeking amendments to the objectives, policies and rules to better provide for supermarket activities, including controlled activity status for retail, with restricted activity status triggered by non-compliance with development controls (some of which Progressive also sought be amended, including height, building coverage, earthworks and noise).
- 2.5 The Decision declined the majority of the relief sought by Progressive Enterprises, including amendments to the activity status and development controls applying to supermarket activities. To this extent the Decision:
- (a) will not promote sustainable management of resources, and will not achieve the purpose of the Resource Management Act 1991 ("RMA") consistent with Part II and other provisions of the RMA and District Plan;
 - (b) will not enable the efficient use and development of resources within the Hauraki Gulf Islands, and will not enable social, economic and cultural wellbeing;
 - (c) will not meet the reasonably foreseeable needs of future generations; and
 - (d) does not represent the most appropriate means of achieving the purpose of the RMA or the objectives and policies, having regard to the efficiency and effectiveness of other available means.
- 2.6 Without limiting the generality of this section 2, Progressive also opposes the Decision for the reasons set out in sections 3-8 below.

Relief sought

- 2.7 The Appellant seeks:
- (a) that the Court amend the Decision as set out below, or if the Court is not minded to grant that relief that the Court amend the Decision in some alternative way that meets the Appellant's concerns as set out in this appeal; and
 - (b) such further or consequential relief (including consequential amendments to any of the provisions) as may be necessary to fully give effect to the relief sought in this appeal.
 - (c) Costs.

3. ACTIVITY STATUS FOR CONSTRUCTING AND ALTERING BUILDINGS - TABLE 10A.12.5

Original submission

- 3.1 Progressive sought controlled activity status (as a "base" activity status) for commercial activities within the Commercial 1 and 2 zones, including amending table 10a.12.5 to provide for the construction and alteration of buildings (Activity 1 and 2 in Table 10a.12.5) as a controlled activity.
- 3.2 Progressive further sought that, in the event that any development controls are not complied with, commercial activities should be classified as a "restricted discretionary", with assessment criteria restricted to the particular matters of non compliance.

Council decision

- 3.3 The Decision declines the relief sought by Progressive on that basis that the Council has intentionally omitted the controlled activity status from the Plan because it does not provide the Council with sufficient discretion to address the adverse effects associated with particular proposals. The Decision states that not all proposals can be adequately mitigated by the use of conditions.

Reason for appeal

- 3.4 There are a number of reasons why the relief sought by Progressive is more appropriate than the Decision in respect of the Commercial 1 and 2 zones, including:
- (a) The Council's refusal to use controlled activity status is arbitrary. Controlled activity status is expressly provided for in the RMA and can effectively ensure that the environmental effects of an activity are avoided, remedied or mitigated provided the activity status is properly implemented and supported by appropriate matters for control and good decision making. There is no valid resource management basis for a Council policy against the use of a particular activity status, and accordingly such policy is not a valid resource management reason to decline Progressive's relief.
 - (b) Restricted Discretionary activity status for developments that fail to comply with a particular standard would give the Council the ability to decline consent in respect of the effects of the breach of that standard.
 - (c) Controlled activity status would more appropriately achieve the objectives and policies for the Commercial Zones, which include enabling and providing for commercial activities within the land unit.
 - (d) Property owners should be entitled to certainty that buildings for uses anticipated by the relevant zone can be constructed on their properties. Failure to provide that certainty may render a number of interests in land as incapable of reasonable use.

- (e) The current activity status for development control modification does not facilitate sympathetic development. Fully discretionary activity status for any non-compliance with a development control could encourage developers to "take the risk" of applying for a proposal which contains several development control modifications, as the activity status would not change. A more graduated approach to activity status would be more appropriate to achieve the objectives and policies and the purpose of the RMA.
- (f) Discretionary activity status, particularly, could open the door to trade competitor involvement and the potential for undue interference resulting in major delays and uncertainty for property owners or developers.

Relief sought

- 3.5 Without limiting the relief sought in paragraph 2.6 above, the Appellant seeks (or words to a similar effect):
 - (a) Table 10a.12.5 be amended to provide for the construction and alteration of buildings as a controlled activity.
 - (b) The Proposed Plan be amended so that when development controls are not complied with, commercial activity be classified as a restricted discretionary activity with assessment restricted to the matters of non compliance with those standards.

4. HEIGHT LIMIT - RULE 10C.4.1: COMMERCIAL 1-7

Original submission

- 4.1 Progressive sought that that the height limit in the Commercial 2 zone be increased to 12m.

Council decision

- 4.2 The Decision declined the relief sought by Progressive, because a maximum height of 8 metres is generally consistent with existing building form in the Gulf Islands and with the maximum permitted height in the Plan. The Decision states 8 metres allows for a two to three storey building (with excavation) and will ensure the landscape remains dominant whilst at the same time providing for economic growth. In addition, the Decision noted that many of the land units and settlement areas are located in sensitive natural environments and in areas characterised by small scale buildings so it is important that the scale of buildings in these land units and settlement areas is controlled in order to maintain visual amenity and character.
- 4.3 The Decision also notes that taller buildings may be appropriate in particular locations and therefore such proposals should be assessed on a case-by-case basis through discretionary activity consents.

Reasons for appeal

- 4.4 Progressive considers that the 8 metre height limit in Commercial 2 is insufficient, and that provision should be included in the Plan to infringe this height by up to 50% as a restricted discretionary activity.
- 4.5 There may be site-specific reasons that warrant an increase in height. For example, much of the middle of Progressive's Site is set lower than the boundary, where height measurements are taken. A more flexible approach to building height is proposed to be adopted in the Commercial 1 zone, where buildings on the northern side of ocean view road are required to be 6.5m in height, but can be increased to 9m if ground level is 3m below the level of Ocean View Road.
- 4.6 The intention of the Commercial 2 zone is to allow for buildings of a commercial nature, and commercial uses often require higher studs. Allowing a 50% infringement of this control as a restricted discretionary activity would better facilitate well designed commercial development, and would be a more appropriate way to achieve the objectives and policies.

Relief sought

- 4.7 Without limiting the relief sought in paragraph 2.6 above, the Appellant seeks that (or words to a similar effect)
- (a) Rule 10c.4.1 be amended as follows:

Any building must not exceed the height specified in tables 10c.1 to 10c.6: Development controls for the relevant land unit or settlement area, provided that large formal retail activities in excess of 500m² GFA in the Commercial 2 (Ostend) zone may seek up to 50% relaxation of the height specified in Table 10c.2 by way of a restricted discretionary activity application where matters of discretion would be limited to visual and amenity effects at the commercial/residential boundary interface.

5. BUILDING COVERAGE - TABLE 10C.2: COMMERCIAL 1-7

Original submission

- 5.1 Progressive sought an amendment to increase the building coverage rule (10c.4.5 and table 10c.2) in the Commercial 2 Zone to allow for supermarket operators to develop their stores efficiently and to address the combination of logistical requirements which are required when developing supermarkets.

Council decision

- 5.2 The Decision provides that Commercial 2 is a highly modified environment consisting of various built structures accommodating commercial, community and residential activities and the resource management issue for such land units is how to provide for a range of activities whilst ensuring these activities do not adversely impact on the environmental quality of surrounding areas.

- 5.3 As a result the Decision provides that a building coverage limit of 40% of net site area in commercial 2 is appropriate as the 40% building coverage limit allows for a high percentage of buildings covering the site whilst providing space for on-site wastewater disposal and parking.

Reasons for appeal

- 5.4 A building coverage limit of 40% lacks sufficient flexibility to allow supermarket operators to develop their stores efficiently. At the same time this inflexibility is potentially contrary to Objective 10a.12.3.2 which seeks to achieve, among other things, good design and enhanced amenity values. Supermarket developments often contemplate undercroft car parking thereby achieving better land utilisation, higher coverage and hence significantly enhance amenity values.

Relief sought

- 5.5 Without limiting the relief sought in paragraph 2.6 above, the Appellant seeks that Table 10c.2 should be amended by the addition of a notation which reads (or words to a similar effect)

Note: Provided that large format retail activities in excess of 500m² GFA may seek up to 100% building coverage by way of a restricted discretionary activity application where matters of discretion would be limited to the potential to enhance amenity values and achieve a good design outcome.

6. DESIGN CRITERIA - CLAUSE 11.5.3.4 COMMERCIAL 1 AND 2

Original submission

- 6.1 Progressive sought that appropriate recognition should be made in the assessment criteria (eg Rule 11.5.3.4) to recognise the key operational requirements of supermarkets.

Council decision

- 6.2 The Decision declines the relief sought by Progressive because the existing criteria at clause 11.5.3.4 are aimed at ensuring that the scale, form and location of buildings in commercial 1 and 2 achieves a positive streetscape environment and high level of amenity. Further, the criteria address the relationship between the building and public areas, particularly the street, and seek to ensure that buildings are of a human scale rather than being large, dominant and impersonal. Finally the Decision states that the criteria are not intended to address the design requirements of particular activities.

Reasons for appeal

- 6.3 There is no reason why particular criteria in a Plan cannot be included with a specific activity in mind. Plans commonly refer to specific criteria for activities which a consent authority is to have regard to, and it is appropriate to do so where those activities have particular characteristics or requirements that need to be recognised and taken

into account. This is particularly the case where there may be positive benefits of such activities.

- 6.4 Progressive maintains that the Plan should appropriately recognise the pragmatic requirement and design constraints that apply to supermarkets.

Relief sought

- 6.5 Without limiting the relief sought in paragraph 2.6 above, the Appellant seeks that Rule 11.5.3.4 be amended to recognise the key design objectives of supermarkets by inserting (or words to a similar effect):

11.5.3.4 Commercial 1 and 2

In commercial 1 and 2, discretion over the matters identified in clause 11.5.2 will be applied so that a positive streetscape environment and high level of amenity is achieved by:

...

4. Ensuring that the building enhances the existing streetscape character and amenity values, while having regard to the functional and operational requirements of the building or activity which is intended for the building.

7. DESIGN OUTCOMES - CLAUSE 10A.12.3.2 OBJECTIVE

Original submission

- 7.1 Progressive sought that Objective 10a.12.3.2 be amended to recognise the key design objectives of supermarkets.

Council decision

- 7.2 The Decision declines the relief sought by Progressive on the basis that the objectives, policies and rules contained within the land unit contemplate larger scale, stand-alone buildings such as supermarkets within the parameters of scale, form intensity and amenity of the Ostend village as they are. The Decision states that the resource consent process provides the opportunity for the functional requirements and day-to-day operations of activities such as supermarkets to be addressed and provided for in a way that ensures the needs of the community are addressed and any adverse effects are appropriately avoided, remedied or mitigated.

Reasons for appeal

- 7.3 The present wording of Objective 10a.12.3.2 fails to consider the important differences between different types of buildings which justify alternative design assessment and treatment. Developments such as supermarkets have operational requirements that are essential to their functionality. While urban design of supermarkets is important, by their very nature they do not fit, nor are they intended to fit, the traditional urban design model. It is both impracticable and

inappropriate for the Proposed Plan to not provide any flexibility for those different store typologies.

Relief sought

- 7.4 Without limiting the relief sought in paragraph 2.6 above, the Appellant seeks that Objective 10a.12.3.2 be amended as follows (or words to a similar effect):

10a.12.3.2 Objective

To ensure that new development within Ostend village achieves good design and safety outcomes and enhances general amenity values, having regard to functional requirements of particular developments, such as supermarkets.

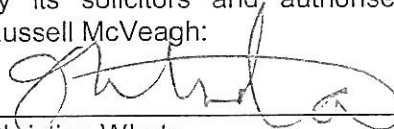
8. MEDIATION

- 8.1 Progressive is willing to engage in mediation to seek to address its concerns and discuss a site specific solution with the Council.

9. ATTACHMENTS

- 9.1 The following documents are attached to this notice of appeal:
- (a) a copy of the Trust's original and further submissions (**Attachment A**);
 - (b) a copy of the Decision (**Attachment B**); and
 - (c) a list of names and addresses of persons to be served with a copy of this appeal (**Attachment C**).

PROGRESSIVE ENTERPRISES LIMITED
by its solicitors and authorised agents
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Signature:

Christian Whata

Date:

24 July 2009

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TO: The Registrar of the Environment Court at Auckland

AND TO: The Auckland City Council

AND TO: Relevant Submitters