BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 250

IN THE MATTER	of an appeal pursuant to Clause 14 of the First Schedule of the Resource Management Act 1991
BETWEEN	ORAPIU LODGE LIMITED (ENV-2009-AKL-000345) Appellant
AND	AUCKLAND CITY COUNCIL Respondent

Court: Environment Judge L J Newhook sitting alone pursuant to Section 279 of the Act (decision made on the papers)

Representation:

Mr B W Putt as agent for Appellant

Mr R Wedekind for himself and other s274 parties

Mr S M McAuley for Respondent

DECISION OF THE ENVIRONMENT COURT REVIEWING EARLIER DECISION AS TO PARTIAL STRIKE-OUT

A. **Decision No. [2010] NZEnvC 158 reviewed, and reheard.**

B. **Ground (g) of the notice of appeal reinstated.**

C. **Costs reserved.**

REASONS

[1] On 12 May 2010 I issued a decision striking out one of several grounds of appeal in these proceedings, ground (g). As my decision records, the application for strike-out appeared to have been met with no response by the appellant after I directed a timetable for parties to respond.

[2] An application has now been made by the appellant's agent, an experienced planner, Mr B W Putt, under S 294 RMA, seeking reinstatement of ground (g). Mr Putt has also made an affidavit confirming certain things, both in relation to the alleged non-response, and in relation to the substance of the relief sought in ground (g).

[3] S 294 RMA provides to the relevant extent as follows:

> **294 Review of decision by Environment Court**
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> (1) Where, after any decision has been given by the Environment Court, new and important evidence becomes available or there has been a change in circumstances that in either case might have affected the decision, the Environment Court shall have power to order a rehearing of the proceedings on such terms and conditions as it thinks reasonable.
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> (2) Any party may apply to the Environment Court on any of those grounds for a rehearing of the proceedings; and in any such case the Environment Court, after notice to the other parties concerned and after hearing such evidence as it thinks fit, shall determine whether and (if so) on what conditions the proceedings shall be reheard.
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> (3) The decision of the Environment Court on any such proceedings shall have the same effect as a decision of the Environment Court on the original proceedings.

[4] In his application and supporting affidavit, Mr Putt explains that while he was aware of the respondent's request for strike-out of ground (g) he did not receive notice of the setting of the timetable for responses. This, he explained was particularly unusual in that when he spoke with in-house counsel for the respondent in the week after the strike-out application, there was no mention by him of the setting of a timetable for responses.

[5] The application for review is advanced on the basis that there is both new and important evidence that has become available, and that there has been a change in circumstances that might have affected the decision. Mr Putt points to the lack of notice (for unknown reason) as to the setting of the timetable. He also asserts that ground (g) of the appeal did not offend in the way it suggested in the strike-out application; and that if he had had the opportunity, he would have placed the material for the Court that is now advanced.

[6] The essence of the latter is that ground (g) was inferentially within the jurisdiction, by being relief of a less intensive kind than had been sought in the submission to the council now reproduced in ground (b) of the appeal. Ground (b) had sought that Commercial 4 zoning be placed over a portion of the appellant's land instead of Landform 5 as mapped in the proposed district plan. Ground (g) seeks less intensive relief, namely that a zone promulgated in the PDP, Island Residential 2 (Bush Residential) be placed on the site instead.

[7] Mr Wedekind lodged a short submission in opposition to the s294 application. I am at a loss to understand his stated grounds of opposition in the context of an application of this sort. The primary ground of opposition is that the relief allegedly 'would not meet the requirements of the RMA or promote community wellbeing under s5 (2) RMA'. While that may be a substantive issue in the appeal, it does not assist the present consideration.

[8] Regrettably, counsel for the respondent filed a lengthy and highly legalistic submission in opposition. The submission sets out in extensive fashion the provisions of s294, the similar provisions in Rules 12.5 and 12.6 of the District Court Rules 2009, and discussion of a host of decisions of the Environment Court (and the Planning Tribunal) concerning these and predecessor provisions. The submission reads more like an answer to a law school examination question, and ironically does not satisfactorily address a key principle arising from those cases. That principle, noted in an earlier decision of mine[1] amongst others exploring the crossover between s294 and the District Court Rule provisions, is that the Court should to seek to identify whether there has been a miscarriage of justice.

[1] Landcorp Limited v Auckland City Council Decision No A028/2009

[9] I have no difficulty in holding there has been a miscarriage of justice here. The respondent, in my May decision, "got home free" with a technical and legalistic application to strike out one of the grounds of this appeal. I hold that ground (g) of the appeal can in effect come in under the umbrella of the other ground (b) that seeks a zone that would allow greater intensity of urban activity.

[10] Finally, the Court is bemused at the lengths that the respondent has gone to, first in seeking to strike out just one of seven grounds of an appeal, followed by the effort that it has gone to, to hold onto its hollow victory. This has been a waste of the Court's and the appellant's time that could have been better employed on other work.

[11] Costs are reserved.

DATED at Auckland this 22nd day of July 2010

L J Newhook
Environment Judge