

BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 163

IN THE MATTER of an appeal pursuant to Clause 14 of the
First Schedule of the Resource
Management Act 1991

BETWEEN C & W GORDON
(ENV-2009-AKL-000326)

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 S M McAuley for Auckland City Council (ACC)
Ms M J Fisher as support person for the appellant

**DECISION OF THE ENVIRONMENT COURT REFUSING STRIKING OUT OF
PARTS OF APPEAL**

- A. Application to strike out part of appeal refused.**
- B. Costs reserved.**



REASONS

[1] The appellants have appealed against a refusal of submissions lodged by them to the review of the Auckland City District Plan – Hauraki Gulf Islands Section. In essence, the appeal concerns the heritage scheduling of a prominent headland that comprises about one third of the appellant's property on the south coast of Waiheke Island. The appeal seeks a number of items of relief, some being in the alternative, including the removal of the scheduling, authorisation to undertake more farm activities on a permitted basis, and the contentious item "*rates relief/support for a reassessment of and reduction in our valuation for rating purposes*".

[2] That item, paragraph 3.3 in the appeal, has caused an extensive flurry of paperwork to be filed by the parties. The council, with some justification at first blush, asserts that there is no jurisdiction under the Resource Management Act to grant the relief.

[3] The appellants appear to have as a support person, someone well versed in the workings of the Act. That person, Ms Fisher filed an extensive memorandum in late February, raising some interesting arguments.

[4] The memorandum describes the background to the original making of the submission and, now, the bringing of the appeal. Mr McAuley has somewhat dismissively in reply described those submissions as "*evidence*".

[5] Ms Fisher has undertaken quite extensive legal research, and raised a number of arguments centring on provisions of the RMA, contrasted with provisions of the Historic Places Act 1993, and even gone to the lengths of offering submissions about interaction of various provisions in Part 2 RMA. Those matters are, however, issues which may well be raised in respect of future progress of some aspects of the appeal that are not under threat from the strike out application.

[6] Nevertheless, in relation to paragraph 3.3 of the appeal, Ms Fisher raises two prime matters for consideration (over and above a number of issues arising under the Rating Valuation Act 1998 and the Local Government Act 2002, where this Court is unlikely to be found to have jurisdiction).



[7] Quoting directly from the February memorandum:

(41) In the CBD the respondent has, we understand, provided heritage credits and/or transferrable development rights to recognize the financial implications of scheduling buildings of heritage value. The heritage floor space bonus compromises some of (a) *compensation for the loss of development potential that arises as a consequence of the building being scheduled for heritage purposes*; and (b) *compensation for the cost of conservation* – paragraph 6.7.2.5 of the Auckland City Council Central Area Section Plan 2004.

(42) Section 85 of the Resource Management Act states compensation is not payable in respect of controls on land. In lieu of compensation Section 85 (3) permits an application to be made to the Environment Court where a proposed plan renders any land incapable of reasonable use and places an unfair and unreasonable burden on any person having an interest in the land.

(43) We understand that the Section 85 test and right of challenge provides a bottom line against excessive use of resource management powers – refer *Environmental and Resource Management Law*, Nolan D, 2005, paragraph 3.101.

[8] Not unsurprisingly, counsel for ACC makes reference to the reported decision of the then planning tribunal in *Leith v Auckland City Council*.¹ There, Mr Leith and others had lodged submissions and brought appeals concerning significant restrictions placed on use of land that they wished to farm on Great Barrier Island in an earlier review of this section of the Auckland City District Plan.

[9] Quoting from pages 421 and 422 of the report, the tribunal said:

We think it is significant that, unlike the former Town and Country Planning Acts which expressly provided for compensation for district scheme restrictions in certain circumstances (see Section 44 of the 1953 Act and Section 126 of the 1977 Act), the Resource Management Act expressly provides (by Section 85) that an interest in land is not taken or injuriously affected by reason of any provision in a plan. Instead of providing for compensation, the Section provides that where a plan provision renders land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Tribunal can delete or direct deletion of the provision.

Local authorities, in their executive capacities, can provide incentives by rates relief to occupiers of land under development or protected for natural conservation purposes (see Parts XIA and XIIB of the Rating Powers Act 1988). We are not aware of any similar power that they may have to grant rates relief or to make available other incentives, such as provision of labour and other resources, fencing or planting costs, free advice, or financial assistance to occupiers of land retained in productive use.

¹[1995] NZRMA 400



Decisions to grant or withhold rates relief of other incentives necessarily involve allocation of public funds and are made by local authorities in their capacities as executive bodies. As such, local authorities are responsible to their electorate from whom substantial proportions of those public funds are collected by rates and charges. They are not decisions of those local authorities under Resource Management Act.

The Planning Tribunal is a judicial body. It does not have any relevant executive functions, and is not responsible to an electorate. We understand that the Tribunal has no authority to interfere with local authorities in such matters, either directly by ordering the offering of incentives, or indirectly by directing amendments to district plans on the basis of the existence or absence of any policy to grant incentives.

[10] Understandably, counsel submits that the above passages set out some fundamental legal difficulties with the relief being sought in the present appeal. I am not sure however that I would go so far as to agree with that, at least for the purposes of a strike-out application.

[11] What evidently was not argued in *Leith* as one reads the decision, was anything like the fairly innovative submission of Ms Fisher that there ought to be District Plan provisions of the sort found in the CBD Section. Secondly, while the tribunal in *Leith* describe certain kinds of relief and incentives as being outside the ambit of the Act, no mention can be found in the decision of the sort of argument now raised by Ms Fisher.

[12] Mr McAuley complains that matters under Section 85 of the Act should not be raised by mere memorandum, but should be the subject of a formal application. I consider that this is to unduly stand on ceremony.

[13] Bearing in mind other decisions of the Courts that resist the taking of an overly legalistic approach when considering applications for strike-out, I consider that the appellants should be given the opportunity to amend their appeal to replace paragraph 3.3 with a prayer for relief seeking the insertion of particular provisions such as those identified by them in the CBD Plan (any requested provisions should be explicitly pleaded), and praying in aid the operation of Section 85 of the Act, particularly sub-Section (3)(a).

[14] The present decision is one taken out of some caution around the treatment of a strike-out application. The parties should not perceive any indication as to the likely success or otherwise of the appeal in the shape now authorised. In particular, the time might come when consideration might need to be given to whether provisions of the CBD



type should be inserted in the plan in such a way as would have applicability beyond the land of the appellants. That might raise the need to consider utilisation of the provisions of Section 293 of the Act, a step not lightly taken.

[15] The appellants are directed to file and serve replacement paragraphs for paragraph 3.3, along the lines authorised, this to be undertaken by 14 June 2010. If replacement paragraphs are not forthcoming by that time, paragraph 3.3 will be considered to have been struck out.

[16] Costs are reserved.

DATED at Auckland this 12th day of May 2010



L J Newhook
Environment Judge

