BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 157

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

BETWEEN WAIHEKE ISLAND COMMUNITY PLANNING GROUP INCORPORATED (ENV-2009-AKL-000348)

Appellant

AND AUCKLAND CITY COUNCIL

Respondent

Environment Judge L J Newhook sitting alone pursuant to Section 279 of the Act

Counsel: P Rikys for appellant

B McDonald & S McAuley for respondent

DECISION CONCERNING APPLICATION TO STRIKE OUT APPEAL

A. Application to strike out appeal in its entirety refused.

B. The relief in the appeal seeking rejection of the entire proposed plan, is struck out.

C. Alternative particulars topics in the appeal are not struck out.

D. Costs reserved.

Introduction

[1] The appeal in this case appeared at first blush to be one seeking rejection of the entire Proposed Plan. Closer analysis however reveals that there are some alternative particular topics, a point inadequately grasped by the respondent in its quest to strike out the entire appeal.

[2] On 2 & 3 February 2010 I conducted a case management conference in relation to all appeals against the proposed Hauraki Gulf Islands Proposed Auckland City District Plan. The respondent foreshadowed that it would apply to strike the appeal out because it sought rejection of the entire proposed plan. Mr Rikys for the appellant, indicated that he would endeavour to refine the appeal so as to remove the council's alleged "jurisdictional concern".

[3] On 17 February 2010 the appellant lodged what it termed a "refined" notice of appeal. To the surprise of the respondent, the appellant continued to seek rejection of the entire review. The grounds for the refined appeal were very shortly stated as being that the decisions of the respondent on submissions originally lodged by Waiheke Island Community Planning Group Incorporated ("**WICPG**") do not adequately comply with or give effect to the relevant provisions of the Act (Part 2 in particular), and the Hauraki Gulf Marine Park Act 2000.

[4] The Refined Appeal then went on to list five alleged inadequacies of process relating to plan development, at least four of which appear to be extremely general (e.g. "*flawed and inadequate consideration of and response to submissions*"). A fifth matter ("*lack of provision of a strategic framework for the plan and linkages thereto, in particular in relation to transport and economic development*") might perhaps be said to be of a little more substance. The Refined Appeal then identified two matters excluded from the plan and six matters inadequately provided for in the plan, together with some more slightly specific topics.

[5] Of some importance, and overlooked by the council in bringing its application to strike out the entire appeal, not only did the Refined Appeal seek that the whole plan be

rejected, but sought: *"... in the alternative that the Plan be amended to take full account of these matters"*.

Analysis

[6] The appeal originally filed in August 2009 did indeed seek but one type of relief, that the whole Plan be rejected (*"and the respondent be required to start the Plan review process afresh taking full account of the matters referenced in this appeal"*). Misunderstanding the term "submission" as employed in clause 14 of the First Schedule of the Act, the appellant attached to its appeal copies of the submissions it delivered at hearings before the Hearing Commissioners of the respondent in August 2007.

[7] The error has been repeated, looking at the attachments to the Refined Appeal.

[8] The respondent now argues that the refined appeal seeks only the entire rejection of the Proposed Plan, and asserts that WICPG should "now be held to account". There is a fairly recognised jurisprudence on this subject, and counsel for the respondent appears to have identified at least the majority of cases that have come before the courts.

[9] The theme of the council's submissions is that the presence of an appeal against the proposed plan in its entirety will prevent the operation of s19RMA (deeming certain rules in proposed plans to be operative if there are no appeals against them, or if all appeals against them have been determined).[1] As long as s19 is unable to operate, certain consequences will flow, for instance parties involved in resource consent applications must assess a proposal against both operative and proposed rules. Two small ironies pertain however, first that s19 applies only to rules and not objectives, policies, and other provisions of plans; and interestingly, s19 was repealed by the 2009 Amendment Act.[2]

[10] The High Court decision in ***Westmark Investments Ltd v Auckland City Council***[3] was made in the context of an application for declaration about a situation in which there were no submissions about a maximum height rule in a proposed review, but there were three submissions challenging the review in its entirety. The declaration was made

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[1] This description of the provision is very much a summary; note that there are similar provisions in relation to the absence or the conclusion of submissions at the earlier stage before the Council.
[2] The transitional provisions of the Amendment Act nevertheless have the effect that s19 remains in force in relation to the subject matter of the present proceedings; it will cease to have force in relation to instruments promulgated after 1 October 2009.
[3] [1995] 3NZLR694

focusing on the particular height rule in question, and some useful observations made regarding the utility of submissions [or later, appeals], challenging a proposed plan in its entirety.

[11] Mr McAuley has quoted a passage from the decision (unhelpfully omitting however the first paragraph of the quote that follows) :[4]

> ...there could be three situations when submissions are made in the context of s19; (a) obviously where a specific submission is made against a specific rule, there can be no problem as to the extent of the submission, its possible effect on the rule would be clear; (b) where a specific submission, such as those of [Mr X], seeks general but limited changes throughout the plan, such as the removal of sexist language, again, there can be no problem; (c) where a submission seeks broad and general changes to a proposed plan, it cannot be held to imperil detailed changes where the submitter makes no attempt to detail the changes that he or she would like to see happen in the plan...
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> A situation can occur where a submitter claims that the whole scheme should be invalid or that the process should be started again because of some procedural deficiency. This occurred under the old legislation in the case of ***Environmental Defence Society Inc v Great Barrier Island County Council*** (1977) 6NZTPA301. There the tribunal upheld the submission of the appellant that the council had acted without jurisdiction in formulating a proposed district scheme; therefore the appeal was allowed. That case was said to be another chapter in the long and troubled history of attempts to formulate a district scheme for the then county of Great Barrier Island; these difficulties have no doubt been assuaged by the incorporation of that island into Auckland City through local government reforms.
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> If such a submission were to be made with reasonably specificity, it could have the effect of freezing the plan for the purposes of s19; it would not have the same non-effect as a general submission such as those filed by [Mr X] and [Mr Y]. One would expect that if a serious challenge of that nature were made, such as happened in the Great Barrier Island case, the council would seek to have an early clarification of the plan's credentials, either by way of declaratory judgement

[4] Both found on p.698 of the report.

> in this court or by applying to the tribunal for a declaration under the useful provisions to that end found in the act.

[12] The respondent submits on this occasion that the Council has not exceeded its jurisdiction in formulating the proposed plan; that WICPG has not met the requirements of the Act to state with due particularity the wording of relief sought; and that accordingly the Council can achieve an early clarification of the credentials of the plan by seeking to strike out the appeal.

[13] S279(4) provides:

> An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the judge considers –
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> (a) That it is frivolous or [...]; or
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> (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
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> (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

[14] Counsel for the respondent has properly submitted that strike out applications in the Environment Court are generally similar to those in civil proceedings in the High Court, quoting from the decision in ***Attorney-General v Prince and Gardner***[5] as follows:

> Strike out applications proceed on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed;...the jurisdiction is one to be exercised sparingly, and only in a clear case where the court is satisfied it has the requisite material;...but the fact that applications to strike out raise difficult questions of law and require extensive argument, does not exclude jurisdiction.

[5] [1998] 1NZLR262

[15] Reference is made to the decision of the Environment Court in ***Briggs v Kapiti Coast District Council***[6], where the court struck out an appeal which sought to review the council's process in making a plan change.

[16] Counsel then referred to the decision of the Environment Court in ***Re Vivid Holdings Ltd***[7], where the Court set out a three step test to establish jurisdiction to appeal, referring particularly to the content of submissions earlier lodged to a district plan. The Environment Court in ***Kitewaho Bush Reserve Co. Ltd v Waitakere City Council***[8], held that prior to the three step test in Vivid being applied, there was an underlying step, that is if the appeal did not raise a relevant resource management issue, the three step test need not be considered.

[17] In ***Leith v Auckland City Council***[9], the planning tribunal considered whether appeals which sought the withdrawal and or substantial modification of a proposed district plan, was a legitimate ground of relief under the Act. There, it upheld the arguments of the council that it is not for the Court to unravel what an appellant seeks, or for the council to enter into a guessing game when preparing its case. The tribunal noted that no modification to the plan that would meet the appellants' cases had been specified with any particularity at all. Nevertheless, and indeed one might remark, with some generosity, it dealt with the matters raised before dismissing them.

[18] Given my findings earlier in this decision about the present appellant having sought alternative relief, the decisions in ***Kitewaho***, and ***Leith***, must be seen as being in some contrast.

[19] WICPG lodged a further document alongside its "Refined Appeal", being an "Application for Leave Not to Abandon Appeal Proceedings". The document should probably have been lodged only in connection with another appeal, ENV-2009-AKL-000324, but nevertheless its attachment 2 appears to provide something of a schedule of topics within the proposed plan that are of concern and interest to WICPG. Noting that the attachment is in fact a copy of a submission delivered at a hearing by commissioners, detailed cross-reference is made to certain submissions and further submissions made in

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[6] Decision number W076/08
[7] [1999] NZRMA467
[8] Decision number A040Bar03
[9] [1995] NZRMA400

the review. These relate to "Part 7 Heritage" in the review, but offer evidence of "particular concerns" having been the subject of submissions.

[20] Mr Rikys has provided the court with submissions in opposition to the application to strike out. He details the background to a number of community groups on Waiheke Island coming together to consider the plan review, and early attempts to reach what he calls a "collaborative arrangement" with a particular committee of council charged with preparing the plan. Apparently the offer of detailed collaboration was rejected, and the group as a result had no input into how certain material was assembled, or was processed, and as to the form in which the plan was eventually notified. My Rikys speaks of the deep disappointment and distress of the group at the council's responses, and concerning the later hearing decisions.

[21] Mr Rikys submits, without any real elaboration, that "*further research and analysis confirms the group's view that the [plan] is deeply flawed and as presently constituted will not provide an effective planning framework to deliver the planning outcome desired and will not enable the purpose of the RMA (section 5) to be achieved.*"

[22] Mr Rikys accepts, referring to case law such as ***Leith*** and ***Westmark*** earlier referred to, that an appeal against a whole plan can only be considered in extraordinary circumstances. However he submits that the "*comprehensive nature of the flaws in the plan are such as to create an extraordinary circumstance...and it is only by hearing argument in a whole plan context, rather than attempting to break down the specified flaws into separate topics, that an overview can be maintained, related back in each instance to the s32 assessment*".

[23] Regrettably, that submission amounts to no more than an assertion that the whole plan is flawed, and does not even commence to offer reasons.

Outcome

[24] My conclusion is that that part of the appeal seeking rejection of the whole plan must be struck out, and it is.

[25] The topics pleaded in the alternative in the refined appeal may however proceed at this time. That however will be subject to further particularisation, given that they are extremely general. These topics are:

Matters Excluded from the Plan

[i] Catchment management bar integrated catchment management

[ii] Landscape protection in a strategic focus from the plan

Matters Inadequately Provided for in the Plan

[iii] The HGMPA 2000

[iv] Heritage

[v] Sustainable management of resources

[vi] Climate change

[vii] Maori interest provisions

[viii] Map provisions

[ix] The move away from a strategic role and focus for the Rural 1 (rural amenity) land unit and the failure to make adequate provision for the HGMPA (although these topics may be adequately catered for in another appeal by this appellant)

[x] Heritage (part 7)

[xi] Part 6, 9, 11 and 14 and appendix 8

[xii] Land units Rural 1 and 2.

[26] As noted, the topics above remain unacceptably general. They are to be further particularised if the appeal is to remain alive. This work is to be done by reference to the relief sought in particular submissions and further submissions lodged by the group. It would be useful if the appellant would consult with the respondent about framing the topics, so that this can be done in a way that takes further controversy out of matters of process at this early stage of the appeal.

[27] If the appellant wishes to proceed further, it is to file and serve on all parties in this case, an amended, particularised appeal on the individual topics listed. This must be completed by 7 June 2010. Mr Rikys has made reference to pressures of time on the Group's voluntary resources, but the step is overdue, and must be undertaken as a priority. Some HGI mediations for next week have been cancelled, so time should now be available to him.

[28] Costs are reserved.

DATED at Auckland this 11th day of May 2010

L J Newhook
Environment Judge

Postscript. After completing this decision, my attention was drawn to yet another submission from Mr Rikys, accompanied by another large wad of paper. The materials at least appear to indicate a wish on the part of the appellant to particularize its various grounds of appeal, although on their face they appear too detailed to constitute pleadings.