IN THE HIGH COURT OF NEW ZEALAND CHRISTCHURCH REGISTRY		AP 27/98
	UNDER	Section 299, the Resource Management Act 1991
	AND	
	IN THE MATTER	of an appeal of a decision of the Environment Court
	BETWEEN:	FOODSTUFFS (SOUTH ISLAND) LIMITED, a company registered in Dunedin
		Appellant
	AND:	CHRISTCHURCH CITY COUNCIL a territorial authority under the Local Government Act 1974
		Respondent
Date of Hearing:		17th February 1999
Counsel:		P.B. Churchman and M.R. Garbett for the Plaintiff A.J. Prebble for the Respondent N. Till and A.C. Dewar for P.D.Sloan
Date of Judgment		31 march 1999.

RESERVED JUDGMENT OF HANSEN J

The appellant appealed the whole of the Environment Court decision, dated 26th May, 1998. The appeal was against the grant of a resource consent by the respondent in favour of P.D. Sloan, which

allowed the establishment of a supermarket on land situated at 999 Ferry Road, Christchurch.

Section 299 of the Resource Management Act 1991 allow appeals to the High Court on a point of law.

It is to be noted that there was an application by P.D. Sloan to have this matter struck out, but that was really subsumed by the substantive hearing of the appeal. It was the appellant's submission that the appeal at its heart was concerned with resolving when a consent authority, or the Environment Court, is able to dispense with applying planning documents which reflect the community's view. Three errors of law are said to arise.

1. The Environment Court erred in giving little weight to both the transitional and the proposed District Plans of the Christchurch City Council. By giving little weight to both those planning instruments, the Environment Court has, in effect, failed in its statutory obligation to have regard to those plans, contrary to s.104(1)(d) RMA.

2. The Environment Court made an error of law in determining that the application was one which passed the threshold test of s.105(2)(b) of the Resource Management Act 1991 (as that section existed prior to its amendment by the Resource Management Act, 1997).

3. The Environment Court made an error of law in exercising its discretion under s.105(1)(c) in favour of granting consent.

SECTION 104 RMA

Section 104, where relevant, reads:

" (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to .....

(d) Any relevant objections, policies, rules, or other provisions of a plan or proposed plan; and....."

Central to the Foodstuffs appeal was the meaning attributable to "shall have regard to" in this particular section.

Essentially, the appellant submitted that the term, in the context of this section, should be interpreted as "shall give effect to" the relevant objective policy, rules or other provisions of the plan, or proposed plan, unless there are some other competing relevant considerations. The appellant further submitted that those relevant considerations would be matters set out in the other sub-sections of s.104(1).

The appellant submitted that in attributing little weight to the transitional and proposed District Plans, the Environment Court failed to have regard to those planning instruments in accordance with s.104 RMA, and, accordingly, the decision fell within the fourth category of errors of law identified in ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** [1994] NZRMA 145.

The term "shall have regard to" has been considered in a number of cases. Counsel for the appellant referred to some of these, and then sought to distinguish them. The first case was ***R v CD*** [1976] 1 NZLR 436, which concerned the Costs in Criminal Cases Act 1967. At page 437, Somers J stated:

" The first question (not I think canvassed before Chilwell J), is what is meant by the words 'shall have regard to'. I do not think they are synonymous with 'shall take into account'. If the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion under s 5(1) and it is clear from s.5(2) that the matters to be regarded are not to limit or affect that discretion. I think the legislative intent is that the court has a complete discretion but that the seven matters, or as many as are appropriate, are to be considered. In any particular case, all or any of the appropriate matters may be rejected or given such weight as the case suggests is suitable, I propose to examine the matter on that footing. "

The second case was the decision of the Court of Appeal in ***New Zealand Fishing Association v Ministry of Agriculture & Fisheries***[1988] 1 NZLR 544. At page 551, Cooke P., in adopting the words of McGechan J stated:

" He is directed by s107G(7) to 'have regard' to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is 'have regard to' not 'give effect to'. They may in the end be rejected or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise. "

In the same, case McMullin J stated at page 566:

" .....a duty on him to receive and *have regard* to what those interested parties have to say in reply. The italicised words are important. They require an open and receptive mind which is nonetheless free to disregard the submissions made if other relevant considerations require it. "

The next case referred to by Mr Churchman, was ***New Zealand Co-operative Dairy Company Limited v Commerce Commission*** [1992] 1 NZLR 601, where Wylie J stated at page 612:

" We do not think there is any magic in the words 'have regard to'. They mean no more than they say. The Tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the Tribunal considers appropriate but having done that the Tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function. "

Mr Churchman accepted that the fetter on the decision maker's discretion in those cases was an obligation to give consideration to appropriate matters, and having done that, they may be rejected, or given such weight as the decision maker deems appropriate. He submitted that the ***New Zealand Co-operative Dairy Company*** case went further, because it stated that having given genuine attention and thought and weight, as considered appropriate, a tribunal is entitled to conclude it is not of sufficient significance alone, or together, to outweigh other contrary considerations which it must take into account, in accordance with a statutory function.

Mr Churchman next referred to a citation from ***Donnithorne v Christchurch City Council*** [1994] NZRMA 97, where the Court stated at page 103:

" .....we do not consider that the fourth criteria set out under rule 13.1 are requirements or standards which necessarily have to be fully met, failing which an application must inevitably be rejected. We regard them as matters which must be considered as part of the weighing-up process contemplated by s104 - such matters being given such weight as the deciding body deems appropriate in the overall mix of relevant considerations. "

He said it should be noted that there the Court introduced a concept of giving such weight as the deciding body deemed appropriate in an overall mix of relevant considerations. On that basis, it was submitted by the appellant that it is not lawful for the

Environment Court to set aside the policies and objectives of the operative and proposed plans in determining a resource consent, save in circumstances where there are other competing relevant considerations to which regard must be given. He said in this particular case there were no other s.104(1) matters with which the policy and objectives of the plan were in conflict, and, therefore, there was no power for the Environment Court to set aside those policies and objectives.

The Environment Court dealt with these issues as follows, at page 58 of their decision:

" 134.Apellants' counsel (especially Mr More) urged on us the importance of following the community's views. He said

> ' Those plans express the community's view of how it is best able to achieve the sustainable management of the resources. In assessing whether this proposal, as a resource consent application, achieves the purpose of the Act, it is essential to determine the extent to which it achieves planning outcomes promoted in those instruments.'

This passage is a key aspect of the case because the Court is reluctant to fly in the face of any community expression of legitimate wishes as expressed in a plan. However, Mr Hearn, who isolated the quoted passage in Mr More's submission, stated in his reply:

> '.....that statement is simply not true in respect of either the transitional or proposed plans. The purpose of the Act did not exist at the time when the transitional plan was prepared and completed. The purpose of district scheme under s.4 of the 1977 Act was significantly different and can only be looked at on the basis of a 'practical middle course' between the old and the new (*K.B.Furniture v Tauranga District Council* (1993) 2 NZRMA 291 (HC).....

> As to the proposed plan, submissions on that have closed. Hearings are currently taking place. No decisions will be given until September of 1998. The provisions of that plan are therefore at an early stage and its final outcome far from settled. '
>
> 135. We agree with Mr Hearn. Only when the plans have been replaced with a tested plan, prepared under the RMA, will the weight to be attributed to the commercial objectives and policies increase. Consequently, we give little weight to the objectives, policies and rules of the transitional plan and proposed plan. "

Clearly, what has occurred here is that circumstances existed that satisfied the Environment Court that little weight could be given to the objectives, policies and rules of the transitional plan, and the proposed plan. The reasons for that are set out. It is clear, therefore, that the Court turned its mind and addressed the matters set out in s.104(1)(d), but for the reasons given attached little weight to them.

Despite that it was the appellant's submission that in the absence of any other competing interest under s.104(1) the Environment Court had no jurisdiction to give little weight to those matters, and to set them aside.

Both the City Council and counsel for Mr Sloan, submitted that this was a wrong interpretation of the section. They submitted that it was clearly contrary to the decisions in ***R v CD*** (supra), ***New Zealand Fishing Association v Ministry of Agriculture & Fisheries*** (supra), ***New Zealand Co-operative Dairy Company Limited v Commerce Commission*** (supra) and the ***Donnithorne v Christchurch City Council*** (supra) cases. In my view, that is clearly the case.

Mr Till, on behalf of P.D. Sloan, submitted the rationale advanced by the appellant for giving this different meaning to "shall have regard to" amounted to seven separate points as follows:

"(i) plans play a central role in resource management and planning,
(ii) plans are elaborate and often extremely expensive,
(iii) plans are prescribed by the Act,
(iv) plans address the resource management issues faced by the community and reflect the community's views,
(v) the Act requires plans to contain objectives and policies.
(vi) rules under the plans have force and effect of a regulation,
(vii) a plan is the focus of the consent authority's function under RMA."

Counsel for P.D. Sloan then submitted that the submissions of the appellant overlooked the ninth broad discretion, which is "any other matters it considers relevant and reasonably necessary to determine the application". He said it was important to note that none of the factors were given precedent or priority, and there was no requirement for the Court to give any more weight to the plans than other relevant considerations. It was submitted that if it was the legislature's intention to so elevate the plans, that would have been stated.

Secondly, it was submitted that the Act was specifically drafted to leave it to consent authorities to weigh the relevant considerations set out in s.104(1), and to give such weight to each of those they considered appropriate, and arrive at a decision as thought fit by the consent authority. It was submitted that the appellant's interpretation of the section is quite contrary to the plain meaning of the words.

Thirdly, Mr Till submitted that the object of the Act did not require such an interpretation. He submitted the scheme of s.104(1) is to set out criteria which the consent authority is to give attention to when considering an application for resource consent. He further submitted that it is clear the Act does not require that all proposals be in accordance with the plan, or proposed plan, as the provisions of s.105(2) provide for circumstances where the proposed activity is non-complying, and an authority is not to grant consent unless the environmental effects are minor, or granting would not be contrary to the objections and policies of the plan.

Further, Mr Till submitted that the fact that s.104 is subject to Part II of the Act is an important factor in interpreting s.104. Part II of the Act sets out the purpose and principles, and in sections 6,7, and 8, a number of factors are listed that require all persons exercising functions and powers under the Act to have regard to. Mr Till submitted that if the plans are to be elevated to the status the appellant now sought to give them, then it would be found in Part II. He submitted, correctly, in my view, that Part II lays down overriding considerations.

I do not consider the term "shall have regard to" is s.104 RMS should be given any different meaning from the cases referred to above. In my view, the appellant is seeking to elevate the term from "shall have regard to" to "shall give effect to". The requirement for the decision maker is to give genuine attention and thought to the matters set out in s.104, but they must not necessarily be accepted. Here, the Environment Court clearly gave genuine attention and thought to the matters set out in s.104, and in particular to sub-clause

(d), and for stated reasons attached little weight to them. It is pertinent to note that they attached little weight, which is different from no weight. Furthermore, it seems to me the reasons given by the Environment Court for attaching little weight, i.e., "only when the plans have been replaced with a tested plan, prepared under the RMA, will the weight to be attributed to the commercial objectives and policies increase", could easily fall within the general discretion granted under s.104(1)(i).

As well, Mr Prebble correctly attacked Mr Churchman's interpretation of the ***New Zealand Co-operative Dairy*** case. In my view, he correctly pointed out that the subject matter under consideration was not Government policy that the Court decided required to be a balancing consideration against others to determine which prevailed. Rather, the subject matter was the merger proposal of the co-operative dairy companies, and, amongst several considerations required by the Commission to consider under the Commerce Act, was Government policy.

Additionally, the appellant's submission can be rejected for the reasons advanced by counsel on behalf of the Christchurch City Council. It was pointed out by Mr Prebble that the interpretation put forward by the appellant would make a nonsense of the resource consent process in part IV of the Act. The power to grant a resource consent is, of course, a power to allow an activity which the plan does not. Consent can be granted even where the proposed activity is contrary to the objectives and policies of the plan, or proposed plan, provided the adverse effects will be minor. He pointed out that this was the basis for the threshold test in s.105(2)(b), now s.105(2A). In fact, he submitted that is what the Environment Court did, because

they noted the first threshold test having been met, there is "strictly no need for us to consider the second".

SECTION 105 RMA

Paragraph 3 of the notice of appeal alleges:

" The Environment Court made an error of law in determining that the application was one which passed the threshold test of s.105(2)(b) of the Resource Management Act 1991 (RMA) (as that section existed prior to its amendment by the Resource Management Act 1997) ".

The relevant portion of s.105 is as follows:

"(2) A consent authority shall not grant a resource consent –

(a) Contrary to the provisions of 106 or section 107 or section 217, or contrary to any Order in Council in force under section 152 or to any regulations, or

(b) Notwithstanding any decision made under section 94(2)(a) for a non-complying activity unless it is satisfied that –

(i) The adverse effects on the environment (other than any effect to which section 104(6) applies) will be minor; or

(ii) Granting the consent will not be contrary to the objectives and policies of the plan or proposed plan, or....."

At paragraph 99 of their decision, the Environment Court stated:

" Two sets of adverse effects were alleged by the appellants: we hold that the traffic effects can be sufficiently mitigated so as to be only minor. "

The appellant submitted that in the absence of the mitigating conditions the adverse traffic effects were more than minor, and, therefore, infringed against s.105(2)(b)(1).

The Environment Court imposed a condition to mitigate adverse effects of traffic. That was condition 7, which reads:

" So long as a supermarket is operating further activities may be allowed on the site:

(1) Provided that the occupier carrying out such activity(ies) has the written approval of the Council's traffic engineer (which shall not be withheld unless the limit in (2) below is met); and

(2) Unless and until in the reasonable estimation of the Council's traffic engineer the traffic flow exiting the site through the central (eastern) egress point will then as a result of any further activity(ies) regularly exceed 770 vehicles per hour for at least 1 hour per day (excluding Sundays). "

Mr Churchman submitted that the conditions imposed were uncertain and unenforceable. He referred to the Environment Court decision in ***STOP CRA Pollution (SCRAP) Incorporated v New Zealand Refining Company Limited*** (1993) 2 NZRMA 586, that reads:

" .....that a clean air licence should use words in their common understanding. It is even more important that resource consents granted under the Resource Management Act should be expressed so that they may be clearly understood by members of the public. That is because of the opportunities provided under that Act for any person to bring proceedings seeking to enforce compliance with resource consents. "

Therefore, Mr Churchman submitted the condition was ultra vires because it was not sufficiently certain for a reasonable person to understand the nature and scope of the activity consented to.

Furthermore, the appellant submitted that s.7 granted consent to activities beyond what was included in the application for resource consent. Mr Churchman cited from ***Clevedon Protection Society Incorporated v Warren Fowler Limited*** (C43/97) at page 15, where Judge Jackson stated:

" To summarise the principles which generally apply are:

(1) The resource consent may go beyond or enlarge the formal application to the extent allowed by the wider application, but subject to that.

(2) The resource consent is limited by the application documents, and this is a jurisdictional issue, not just an evidential one as to conditions.

(3) Under the Act the supplementary information is usually part of the application documents as a matter of law, or sometimes of fact.

(4) Under the Town and Country Planning Act 1977 any supplementary information supplied at the request of the Council may also restrict the scope of the wider application and this is a matter of fact to be determined in each case. "

Mr Churchman pointed to the fact that the resource consent was to construct and operate a supermarket, and condition 7 commences, "so long as a supermarket is operating further activities may be allowed on site....".

Finally, it was submitted that the condition was one that was impossible to enforce.

Both counsel for the Christchurch City and for Mr Sloan submitted that the condition was not ultra vires. Counsel for the Christchurch City went further by submitting that condition 7 was clearly a "certifier" condition, and not a "compliance" condition. He said, on that basis, the ***STOP CRA*** case can be distinguished. In support of that submission, Mr Prebble relied on the Court of Appeal decision in ***Turner and Others v Allison and Others*** [1971]NZLR 833, which has been considered in a number of other cases. He referred to the decision of Salmon J in ***Olsen v Auckland City Council*** [1998] NZRMA 66, as usefully summarising these conditions. At page 70 Salmon J stated:

" The dividing line between the function of certifier and arbitrator is not always easy to define. *Turner v Allison* remains the classic statement of the principle. The issue was dealt with in the judgment of if Richmond J at pages 855-857. There were four conditions under challenge in that case. The first three required that external appearance of a proposed supermarket, site screening and landscaping and planting should all be to the satisfaction to Miss Nancy Northcroft, a town planner and architect. The fourth condition required that where practicable the conditions were to be complied with before any business was commenced and that any dispute was to be settled by Miss Northcroft whose decision would be final and binding. The Court held that under the first three conditions Miss Northcroft's task was to set a standard using her own skill and judgment. Her role was that of a certifier. However, so far as the last of the four conditions was concerned it purported to confer upon Miss Northcroft the powers of an arbitrator and went beyond the power of the Town and Country Planning Board to impose conditions".

Further at page 71, the Court stated:

" I am satisfied that the condition in the present case does not offend the principle. The delegation is to an officer (identified by position rather than name) who is regarded by the Council as having the skill necessary to make decisions regarding ground movement. The condition requires the officer to exercise a judgment, but not to resolve a dispute. In so far as there is a requirement to exercise a judgment, the condition is in the same category as those which were approved by the Court of Appeal in *Turner v Allison*".

Accordingly, Mr Prebble submitted that condition 7 was clearly a certifier condition of the type approved in ***Turner*** and in ***Olsen***. He submitted that it allowed the council's traffic engineer to certify the operation of further activities, provided the traffic flow exiting the site did not regularly exceed 770 vehicles for at least one hour per day. In line with ***Turner*** and ***Olsen***, it was submitted that it is a delegation to a duly qualified council officer, with the necessary skills to make decisions regarding the traffic flow.

As Mr Till noted, condition 7 is enforceable, firstly, through granting, or withholding written approval, and, secondly, by way of estimation of traffic flows from the further activities with enforcement action if required.

In my view, it is a certifier clause, and is not subject to the principles of drafting applied to compliance conditions in cases such as the ***STOP CRA*** case. Therefore, it is not a condition open to enforcement by a member of the public under Part X of the Act, and the need for it to be clearly understood by members of the public does not exist.

In relation to the alleged enlargement of the resource consent, both Mr Prebble and Mr Till submitted that this was not the case. As Mr Till noted, the condition does not grant consent for any non-permitted activities, and if further activities were to be undertaken, they would either have to be permitted, or if non-permitted, a resource consent would need to be obtained.

Further, as Mr Prebble noted, the Environment Court recognised through condition 7 that the site for the proposed supermarket was a large one. The supermarket was not to utilise all of the site, so it was reasonable to assume that other activities may well be established in due course. If they required resource consent, conditions could be imposed ensuring the cumulative effect of the development did not endanger traffic to Ferry Road. However, Mr Prebble submitted, correctly, in my view, that the purpose of condition 7 was to provide some protection in the event of an activity being established as of right on the property. This can be seen from the decision of the Environment Court at page 76, where they stated:

> " In any event, its primary purpose is to look forward and ensure that the cumulative effect of developing the land are not dangerous to traffic on Ferry Road. We consider the appropriate condition should control total vehicles moving off the site rather than off the balance title. Such a condition is more clearly intra vires because it does not attempt to control permitted activities off site".

Therefore, it can be seen that the condition does not seek to enlarge the resource consent, all it does is seek to impose a traffic limit on traffic levels that can be generated by all activities on the site.

In paragraphs 69 and 71 of the case on appeal, the appellant submitted that the condition "does not sufficiently control the adverse traffic effects which the proposal is likely to generate", and "is impossible to enforce". As Mr Prebble noted, the first allegation is, on its face, an allegation of error of fact, not law. In my view, it was not suggested by the appellant the condition is not one supported by the evidence. Certainly, the appellant has not satisfied me that there was no evidence to support such a conclusion. (See ***Marris v MWD*** [1987] 1 NZLR 125, and ***Hutchinson Brothers Limited v Auckland City Council*** (1988) 13 NZTPA 39).

Finally, Mr Prebble pointed to the fact that the condition was a certifier, not one of compliance, and the Environment Court reserve leave to the parties to seek to amend the conditions further. The council's traffic engineers have not sought such an amendment, as they were satisfied as to its term, which satisfies me the condition can be enforced. I do not consider the appellant has made out this ground either.

Finally, in relation to this point, both Mr Till and Mr Prebble submitted that if the Court found the condition to be ultra vires, there was a discretion to refer the matter back to the Environment Court for further consideration (***Barry v Auckland City Council*** [1975] 2 NZLR 646 (CA)).

In the circumstances of this case, if, in fact, I had reached the conclusion that the condition was ultra vires, I would have sent the matter back to the Environment Court for further consideration. Given that I have not concluded it is ultra vires, such a consideration is unnecessary.

SECTION 105(2)(b)(ii)

Mr Churchman submitted that to meet the threshold test in the above section, the Environment Court was required to be satisfied that "granting the consent will not be contrary to the objectives and policies of the plan, or proposed plan".

The Environment Court based its decision on the test set out in the ***New Zealand Rail v Marlborough District Council***[1993] 2 NZRMA 449 decision. At paragraph 101 of the decision, the Environment Court noted that the first threshold test having been met, there was no need to consider the second. However, they did consider the threshold test in the above section out of deference to the arguments advanced by counsel. They stated the relevant tests from the ***New Zealand Rail v Marlborough District Council*** (supra) case as follows:

> " .....where there are relevant general objectives and policies that might be thought to be in conflict with more specific relevant objective and policies, we take the view that for the purposes of s.105(2)(b)(ii) of the Act it is the latter that should be regarded as being applicable, otherwise absurd results could follow. A general objective and policy could be read an precluding a development referred to in a more specific objective and policy."

Mr Churchman submitted that essential to the test is that the relevant general objectives and policies must not conflict with the more specific relevant objectives and policies. Where a conflict occurs under the ***New Zealand Rail*** test, it is appropriate to regard the more specific objectives and policies as being applicable, rather than the more general.

At paragraph 103 of the Environment Court decision, the Court stated:

" In this case we hold that the relevant objectives and policies of the transitional plan for the purposes of section 105(2)(b) are those in the Employment 2 zone. Other, wider policies are relevant only to the exercise of our discretion under section 105(1)(c) and we may return to that issue later. We find that granting consent to the proposal would not be opposed in nature to the objectives of the Employment 2 zone. In particular, the supermarket would bring employment and servicing activities to the area. We acknowledge that the appellants and the Council's planning witnesses all found that granting consent to the proposed supermarket would be contrary to the objectives and policies of the transitional plan. However, they all referred to the wider objectives and policies which we hold is not permitted by *NZ Rail.* "

The appellant submits that that finding is an error of law, as the Court has failed to identify a conflict and misapplied the test.

However, Mr Prebble referred to paragraph 133 of the decision of the Environment Court, where they held:

" In conclusion; in respect of the transitional plans we find that while not contrary to the specific relevant objectives and policies, granting the consent will work against rather than for achieving the more general policies. In respect of the proposed plan, granting the consent is about neutral in respect of the objectives and policies. "

Mr Prebble submitted that reading paragraph 103, together with 133 shows, clearly, that the Environment Court has found the conflict exists, and followed the ***New Zealand Rail*** test, preferring the specific to the general.

In my view, paragraph 103 cannot be read in isolation. It must clearly be read in the context of the whole decision, and paragraph

133 must be taken into account as well. When read in that light, it is clear, in my view, that the ***New Zealand Rail*** test has not been misapplied.

At paragraph 81 of the written submissions of the appellant Mr Churchman submitted:

> " The Environment Court disregarded this evidence on the basis that these were wider objectives and policies in the Transitional District Plan. It is submitted that no conflict was held to exist between these wider objectives and policies and the relevant objective and policies included in the Employment 2 zone in the Transitional District Plan. "

Mr Churchman went on to submit that by disregarding the wider objectives and policies of the Transitional District Plan, the Court misapplied the ***New Zealand Rail*** test, and failed to take into account relevant considerations constituting an error of law.

Mr Prebble pointed out that the Environment Court held the relevant objectives and policies of the Transitional Plan are those in the Employment 2 zone. There appears no argument that these are the relevant specific objectives and policies. If there is no conflict between these specific objectives and policies, and the more general objectives and policies, Mr Prebble submitted that a finding "granting consent to the proposal would not be opposed in nature to the objectives of the Employment 2 zone" must equally apply to the applicable and consistent general objectives.

Further, Mr Prebble accepted that if, as a matter of fact, the general objectives and policies are consistent with the Employment 2 zone, then the Environment Court misapplied the ***New Zealand Rail***

test. However, he submitted that such an error could not materially affect the decision, as it must mean the Court was entitled to conclude that the application was "not opposed in nature" to the objectives and policies of the transitional plan.

To support his proposition, Mr Prebble referred to the decision of Holland J in ***Royal Forest and Bird Protection Society Inc v W.A. Habgood Limited*** (1987) 12 NZTPA 76. There Holland J held that if it was established beyond doubt that the error concerned did not materially affect the tribunal's decision, the Court may dismiss the appeal.

It seems to me that the ***Royal Forest and Bird Protection Society Inc v W.A. Habgood Limited*** (supra) decision has application in this case. I consider Mr Prebble's submission is correct. If there was such an error, it could not have materially affected the decision, as the Court would necessarily have concluded the application was not "opposed in nature" to the objectives and policies of the transitional plan. So even if there was that error, which I do not accept, following ***Habgood*** I would dismiss this appeal as the error has not, in my view, materially affected the Environment Court decision.

SECTION 105(1)(c)

Paragraph 5 of the notice of appeal states:

" The Environment Court made an error of law in exercising its discretion under section 105(1)(c) in favour of granting consent."

Section 105, where relevant, reads:

" 105(1)(c) a resource consent (other than for a controlled activity or a discretionary activity or a restricted coastal activity), a consent authority may grant or refuse the consent, and (if granted) may impose conditions under s.108. "

At paragraph 103 of its decision the Environment Court stated:

" In this case we would hold that the relevant objectives and policies of the transitional plan for the purposes of section 105(2)(b) are those in the Employment 2 zone. Other wider policies are relevant only to the exercise of our discretion under s.105(1)(c), and we may return to that issue later. "

Mr Churchman submitted that at paragraph 126, the Environment Court held the evidence of the planning witnesses for the applicant and the city was preferred, and he submitted much of that evidence was directed towards the proposition that the proposed activity was contrary to the objectives and policies of the Transitional District Plan.

Mr Churchman then carefully took me through portions of the evidence of the witnesses, Batty, Garland, Anderson, Constantine, Smith and Chrystal. Having reviewed that evidence, he submitted that by granting consent based on the evidence, the Court came to a conclusion that it could not reasonably have made. He submitted that at paragraphs 129 to 133 of the judgment, the Court analysed four assessment criteria contained within the proposed District Plan. It is unnecessary to set those criteria out in full here. Further, Mr Churchman pointed to paragraph 123 of the decision, where the Environment Court stated:

" We consider that, subject to any Part II considerations, the transitional and proposed plan should have equal weight. They are not inconsistent with each other in broad terms. The proposed plan is also helpful because it gives assessment criteria to focus on. We return to these shortly. "

Mr Churchman then went through paragraphs 129 to 132, and related it to other evidence given by the witnesses set out above. He said under paragraph 129 the finding that the supermarket in itself meant that retailing in the Business 3 – 6 zones would be significantly added to, was a factor which suggested the consent ought not to be granted.

At paragraph 130 there was a finding agreeing with the appellant's evidence that there would be pressure to allow other retailing in the vicinity of the supermarket, but such pressures could be resisted by the council. Again, Mr Churchman submitted this was a factor suggesting the consent ought to be refused. In paragraph 131 was a finding by the Court that the scale of retailing would adversely affect existing suburban commercial centres, and, again, this was a finding suggesting consent ought to be refused.

Finally, under paragraph 132 there was a finding that adverse traffic effects could be adequately controlled by the conditions imposed.

Mr Churchman submitted that for each of the assessment criteria the Court made a determination which favoured declining the resource consent. Despite that, it exercised a discretion to grant the consent. He submitted that any reasonable decision maker, properly appraised of the assessment criteria and the evidence, could not possibly exercise their discretion to grant a consent. He further submitted the Court's own findings on the assessment criteria required the consent be declined. Accordingly, he submitted that the decision to exercise its discretion, pursuant to s.105 RMA was a conclusion based on the evidence that the Court could not reasonably have made, and, therefore, it fell within the second categories of errors or law identified in ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** (supra).

Again, both Mr Prebble and Mr Till took issue. Mr Prebble pointed out that the assessment criteria in the proposed plan acts as a guide to the consent authority in exercising its discretion to decline or grant consent under s.105(1)(c). He submitted the Court did not, in respect of each assessment matter come to a conclusion which favoured declining resource consent. In relation to the finding that consent would significantly add to the extent of retailing in the Business 3 –6 zone, it was submitted that that finding alone does not require a determination that a discretion should be exercised to refuse consent.

In the assessment dealing with the prospect of an aggregation of retail activity in the vicinity, Mr Prebble noted the further statement of the Environment Court, "The fact that further resource consents would be required means that the Council could control the extent of further retailing." He accordingly submitted that what the appellant argued that an increase in retail activity in the vicinity was found to be created by the supermarket, and this was a factor suggesting consent ought to be refused, was not correct. He said what the Court made plain was that there will be pressures to allow retail activity, but it is one that can be resisted by the Council in the resource consent process.

In relation to the assessment dealing with whether or not the proposal would adversely affect existing suburban commercial centres, or the central city zone, Mr Prebble again submitted that what was put forward by the appellant was not entirely correct. Mr Churchman had submitted that the finding suggests the scale of retailing would adversely affect existing suburban commercial centres. But, in fact, what the Court said was that "In summary we hold that there will certainly be effects, and

in the short term they may be adverse, but in the slightly longer term they are likely to be positive as existing or new businesses fill any gap."

Finally, in relation to the traffic, Mr Prebble pointed to the fact that it had already been considered in some detail earlier. Again, given the finding of the Environment Court, and the condition imposed, I do not find it suggests consent ought to be refused, as Mr Churchman submitted.

Mr Till made similar submissions, and, in particular, relating to traffic, he attacked the bald statement made by Mr Churchman at paragraph 96 of his written submissions, and submitted:

> " The appellant's submission in paragraph 96 is a bald, factual onslaught on that finding simply stating the proposal will create adverse impacts on traffic suggesting that consent ought to be refused. That submission is undeveloped and can only be done by way of a challenge to the factual findings made by the Court on the traffic evidence. "

That seems to me to be the case.

While the first matter raised by Mr Churchman may very well count against the granting of consent, he has been selective in his treatment of the other factors. Reading them in their entirety, I am not satisfied that the findings of the Environment Court on the other three assessment factors suggests that consent ought not to be granted. Mr Churchman has failed to satisfy me that a reasonable decision maker, properly appraised of the criteria and the evidence, would decline consent.

Accordingly, I would also dismiss this ground of appeal.

GENERAL

In conclusion, Mr Prebble referred to the Court to the decision of ***Nicholls v District Council of Papakura*** [1998] NZRMA 233, at page 235. There Potter J stated

" There are important aspects which this Court must bear in mind in considering any appeal before it. These principles are laid down in the various cases that have come before the Court, and are relevant in this case –

(a) The High Court will not concern itself with the merits of the case under the guise of a question of law; *Sean Investments v Mackellar* (1981) 38 ALR 363.

(b) The appellate Court's task is to decide whether the Tribunal has acted within its powers. *Hunt v Auckland City Council* [1996] NZRMA 49.

(c) The question of weight to be given to the assessment of relevant consideration is for the Environment Court (Planning Tribunal) alone, and not for reconsideration by the appellate Court as a point of law; *Hunt* (supra) *Moriarty v North Shore City Council* [1994] NZRMA 433.

(d) Any error of law must materially affect the result of the Environment Court's (Planning Tribunal's) decision before the appellant Court will grant relief; *Countdown Properties* (supra) *BP Oil NZ Limited v Waitakere City Council* [1996] NZRMA 67.

(e) To succeed an appellant must identify a question of law arising out of the Environment Court's (Planning Tribunal's) determination and then demonstrate that that question of law has been erroneously decided by the Environment Count (Planning Tribunal); *Smith v Takapuna City Council* (1988) 13 NATPA 156.

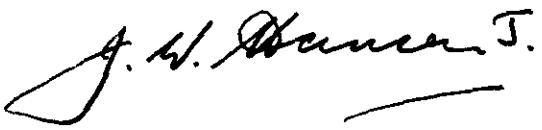
(f) On an appeal under s 299 it is not for the High Court to say whether the Environment Court (Planning Tribunal) was right or wrong in its conclusion but whether it used

> the correct test and all proper matters were taken into account; *City Council* (1983) 9 NZTPA 289. "

Having considered all of the lengthy submissions of counsel and bearing in mind the factors just mentioned, for the reasons set out earlier, I would conclude that the appellant has failed to prove that any of the questions of law put forward by it have been erroneously decided by the Environment Court.

Accordingly, the appeal is dismissed.

Counsel are to file memoranda as to costs within 21 days of the handing down of this decision.



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