DOUBLE SIDED ORIGINAL

Decision No. C 40/2002

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a reference pursuant to Clause 14 of the First Schedule of the Act

BETWEEN **VALERIE MARION CAMPBELL**

(RMA 532/99)

Appellant

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

-Environment Judge J R Jackson (sitting alone under section 279 of the Act)

HEARING at **CHRISTCHURCH** on 6 and 14 March 2002

APPEARANCES

Mr H L Cuthbet-t for Mrs V M Campbell
Mr J G Hardie for the Christchurch City Council
Ms A Dewar and Ms A C Limmer for the C S Campbell Family Trust, Houseman Developments Ltd, and Chrystall Holdings Ltd – as section 271A parties

DECISION AS TO JURISDICTION

Introduction

[1] This is another decision as to the scope of Mrs Campbell's reference about the provisions of the proposed City Plan of the Christchurch City Council ("the Council") prepared under the Resource Management Act 1991 ("the Act" or "the RMA"). In a decision dated 21 February 2002' I held that her reference, which on its face seeks to rezone land from a Living Hills A ("LHA") or B ("LHB") zone to a Rural (Hills) zone, does not apply to land owned by a Mr and Mrs

[1] Decision C23/2002.

Bryce and which is zoned in the proposed plan as "Living Hills" (which is different from the LHA and LHB zones).

[2] The question now raised by Ms Dewar for various other section 271A parties about the reference has raised rather more complex issues about the Court's jurisdiction. Those parties – Chrystall Holdings Ltd, Houseman Developments Ltd and the C S Campbell Family Trust (together called "the landowners") – own land on Monck's Spur and Mount Pleasant towards the eastern end of the Port Hills. Their land was zoned LHA or LHB by the Council in the proposed plan (as revised) and so they understood (according to counsel) Mrs Campbell's reference as seeking a change of zoning to a Rural Hills zone. That appears simple enough.

[3] Pursuant to a timetable order for the exchange of evidence, Mrs Campbell has given her evidence – including that of a landscape architect Ms D J Lucas – to the Council and the landowners. In that evidence apparently Mrs Campbell states that she now accepts that at least some of the land on Monck's Spur should not be rezoned as Rural H, but may remain LHA or LHB subject to further controls as to design, landscaping, and the provision of development plans. I add that I have not seen any such statement by Mrs Campbell and nor has there been any formal advice to the Court that she is limiting the scope of the relief she seeks. In fact at the hearing before me, her recently instructed counsel, Mr Cuthbert, expressly stated that Mrs Campbell was not resiling from the relief she claims in her reference.

[4] I should also record that I was handed, by consent, an "Addendum" to the evidence of Ms D J Lucas (a landscape architect to be called for Mrs Campbell) which shows that that witness is recommending design controls, apparently within a framework of LHA and/or LHB zonings in respect of the landowners' land.

[5] What the landowners object to is that while they had previously understood the issue between the parties was "Living Hills A (or B) zoning versus Rural Hills zoning", they now find from the briefs of evidence circulated

by Mrs Campbell, that it appears the real issue is as to modification of their land's zonings (but not for the LHA and LHB zones elsewhere on the Port Hills) by the addition of extra design or landscaping controls. They submit it is beyond the Court's jurisdiction to consider imposition of such controls.

[6] There is some urgency about this because the Port Hills references have been set down for hearings in various weeks over the next three months commencing with the general cases of the parties on Monday 11 March 2002. A further complication is that after the first hearing on 6 March 2002 I considered there might be a more fundamental difficulty with Mrs Campbell's original submission to the Council – in particular whether any of the relief now sought was requested in the original submission. I raised that with the parties and then reconvened the hearing on 14 March, for further argument.

Background

[7] The Council notified its proposed plan in 1995 (this version of the City plan I will call "the notified plan"). After receiving submissions and conducting a hearing on them the Council notified an amended plan in 1999 ("the revised plan"). Mrs Campbell's reference to the Court of provisions in the revised plan was founded on her original submission to the Council concerning the notified plan.

[8] The undated and unsigned submission by Mrs Campbell to the Council reads (relevantly):

> *Submission to the Proposed City Plan*
> *Valerie Campbell*
> *Port Hills Road, Christchurch 2.*
>
> *Introduction:*
> *...*
> *I wish to submit points on a number of aspects of the Plan:*

Protection of the Port Hills, including comments on Hills Housing and its expansion.

Coastal environment

Maintenance of public access to the Port Hills, coastline and waterways.

The Green Wedge.

Protection of the Port Hills

While the recreation value of the Port Hills is immense, its value as an unbroken backdrop [of consfsntly (sic) changing natural beauty] to the city of Christchurch is immeasurable. It feeds the aesthetic needs of our citizens as well as the need for passive and more active recreation.

Volume 2: environmental results anticipated; second point

P2/14

Present statement is too vague, restricting [I] suggest:

"Maintenance of overall natural character AND significant features of the Port Hills."

. .

Volume 2: Objectives; p 2/22;

I applaud the objectives expressed in this section ie. "buildings are controlled as to their appearance, siting, location and scale to ensure that any adverse effects are minimised"

In fact this is not carried through in the ***Rules.*** *While there are limits to the area of building on a particular site, and to its size in residential zones there are NO* ***guidelines whatever as to its appearance, sty/e or colour.***

I, and a great many others agree, that much of the housing being built at present is ***unsympathetic to its setting and distracts from the unbuilt environment*** *in which it intrudes. Examples which spring to mind as being especially disfiguring to the Christchurch backdrop are Mt Pleasant [and] new divisions east of Cashmere. Similar buildings on the* ***proposed developments at Worsley's Road, above Halswell Quarry and the extension of Mt Pleasant*** *are to be deplored given this lack of "guidance" on the part of the City Council.*

I request the following:-

* *that these developments be withdrawn from the City Plan and be returned to RuH zone.*
* *that the City give serious consideration to developing some guidelines indication the general structure and colours regarded as appropriate to such visible ENVIRONMENTAL SITES.*
* *that above the 160 metre contour any building will be a notifiable act.*

Volume 3: Statement of Rules. Chapter 5: Conservation Zone.

I support the general thrust of the Rules governing the Conservation Zones. . . .

[My emphasis].

[9] There is a slightly disconcerting use of emphases in the submission, however at first sight the following points about the relief claimed in the submission seem to follow: Mrs Campbell is raising four issues with the Council and the first of these is the "protection" of the Port Hills. She then considers each issue in turn, commencing with the Port Hills. She is concerned about the effects of new housing development on the Port Hills in three places: Mount Pleasant, Worsley's Spur, and near Halswell Quarry. She wishes "new developments" in those areas to be rezoned as Rural Hills. All buildings above 160 metres are to be "notifiable" regardless of zone.

[IO] The Council then had to summarise Mrs Campbell's submission (amongst thousands of others) under clause 7 of the First Schedule to the RMA. By consent I was given the relevant pages of the Council's summary of submissions. There are hundreds of pages of summary in total, but in relation to Mrs Campbell's submission they state:

2-2.4	**The protection and enhancement of key elements and processes comprising the City's natural environment.'**				
	- z - j - - -		**Decision ID**	**Request**	**Decision Sought**
	...				
	S2962	V Campbell	D6810	Amend	That the City develop guidelines for general structure and colours appropriate to visiable (sic) environmental sites.[3]
3-4	**Rural Zones**				
	Submission ID	Submitter	Decision ID	Request	Decision **Sought**[4]
	S2962	V Campbell	D6812	Amend	That above the 160m contour of any building be a notified application.[5]
	...				
4-55	**Planning Map 55**				
	Submission ID	**Submitter**	**Decision ID**	**Request**	**Decision Sought**[6]
	S2962	V Campbell	D6809	Amend	Rezone Living HA zone .and (Living 1 zone?) in Mt Pleasant area to Rural (Hills) zone.'
	...				
	Planning Map 59"				
	S2962	**V Campbell**	**D6806**	Amend	Rezone Living HA zone above Halswell Quarry to Rural (Hills) zone.[9]
	I..				

2 Summary p.31.
3 Summary p.177.
4 Summary p.324.
5 Summary p.325.
6 Summary p.796.
7 Summary p.799.
8 Summary p.803.
9 Summary p.805.

	Planning Map 60"'				
	S2962	V Campbell	D6808	Amend	Rezone Living HB zone(?) in Worsleys Road to Rural (Hills) zone."

The most relevant entry for current purposes relates to Planning Map 55. It will be seen that the Council staff "read" Mrs Campbell's mind. The summary of her submission is more explicit about the relief she is seeking than the submission itself – it states that she is seeking to change the LHA zone in the Mount Pleasant area (and, by implication, shown on Planning Map 55A) to Rural Hills.

[I I] In its decision the Council declined to grant any of the relief sought by Mrs Campbell in respect of the Port Hills. In her reference the relief claimed by Mrs Campbell is (relevantly):

> *That the areas zoned Living Hills A and B, [in the area known generally as Mt Pleasant] on Planning Map 55, in the* ***Christchurch City Plan,*** *notified in May, 1999, which have not been already the subject of a Decision of the Environment Court, be returned to the RuH zone.*
>
> ...
>
> ***And*** *Any consequential changes, including cross-referencing or explanation, necessary to give effect to the relief sought, . . .*
>
> ***Or*** *Such other relief as may be considered appropriate by the Court and/or the parties in agreement.*

[12] With that background, I now turn to ascertain whether Mrs Campbell's submission and reference give the Environment Court jurisdiction to entertain the relief she now seeks. I adopt the approach set out in ***Feltex Carpets Ltd v Canterbury Regional Council'*:**

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10 Summary p.808.
11 Summary p.808.
12 (2000) 6 ELRNZ 275 at para [9].

the relevant factors to consider when examining the breach of a requirement of the RMA include:

(1) What is the purpose of the provision, looking at its text in isolation? (the more important it is to other people the less accepting of any breach the Court is likely to be)

(2) What is the place of the provision in the organisation and format of the RMA, and what is its relative importance in that scheme?

(3) What is the extent of the breach?

(4) What is the actual effect of the breach on other persons?

(5) Making an overall assessment in the light of the answers to (1)-(4): is the purpose in section 5 of the RMA and of the particular provision sufficiently met to excuse the breach?

Purpose of a submission

[13] Clause *6* of the First Schedule to the RMA provides that any person may "in the prescribed form" make a submission on (inter alia) a proposed plan that has been publicly notified. The prescribed form is identified by Regulation 5 of the Resource Management (Forms) Regulations 1991 ("the Regulations"). This states:

> 5. *Submissions to Local Authorities*
>
> *Every submission under clause 6 of the Schedule 1 to the Act on a proposed policy statement or plan shall be in form 3 in the Schedule to these regulations or to like effect.*

The words "to like effect" express what modern principles of statutory interpretation imply - that compliance with a form need not usually be exact. The High Court in ***Countdown Properties (Northlands) Ltd v Dunedin City Council***[13] stated:

[13] [1994] NZRMA 145 at 147.

Persons making submissions in many instances are unlikely to fill in the forms exact/y as required by the First Schedule and the Regulations, even where the forms are provided to them by the Local Authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.

[14] Form 3 of the Regulations requires a submitter, after identifying himself or herself and the relevant local authority and proposed plan, to supply the following information:

1. *The specific provisions of the proposed policy statement or plan that my submission relates to are as follows:*

2. *My submission is that:*

   [State in summary the nature of your submission. Clearly indicate whether you support or oppose the specific provisions or wish to have amendments made, giving reasons]

3. *I seek the following decision from the local authority:*
   [Give precise details]

4. *I do or do not wish to be heard in support of my submission.*

5. *If others make a similar submission I would or would not be prepared to consider presenting a joint case with them at any hearing.*

[15] Form 3 also requires:

(b) the signature of the person making the submission (or their agent);
(c) a date;

(d) a title, and address for service of the submitter.

None of these requirements were met in this case. However, since the requirement for a signature and address for service are, partly, duplication of information required at the head of Form 3 (and Mrs Campbell did supply her name and address) I hold that those omissions do not invalidate her submission. Of greater concern is whether Mrs Campbell complied with the first three substantive requirements of Form 3 as quoted above, and this issue – as to the extent of the breach – will be examined below.

[16] The High Court has given some guidance on what is required of submitters. In ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** the Full Court stated[14]:

> *Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than the rejection of the plan change. The Council in ifs decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.*

The High Court continued?

> *Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that councils need scope to deal with the realities of the situation. To take a legalistic view that a council can only accept or reject the relief sought in any given submission is unreal.*

It concluded that?

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14 [1994] NZRMA 145 at 167.
15 [I 994] NZRMA 145 at 165.
16 [1994] NZRMA 145 at 164.

... *the local authority or Tribunal [now the Environment Court] must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.*

[17] In this context there are three points particularly worth noting about ***Countdown:***

(1) that some of the modifications to the proposed plan change were not specifically sought as "relief" in a submission, but were contained in "grounds". Thus there is High Court authority for the proposition that one cannot rule out relief based on reasons in a submission. ***Countdown*** was followed by the Environment Court in ***re an Application by Vivid Holdings Ltd***[17] where the reasons for a reference were held to give guidance as to the real relief sought;

(2) It is "unreal" and legalistic to hold that a Council can only accept or relief sought in any given submission. In other words the local authority may amend its proposed plan in a way that it is not sought by <u>any</u> submission – subject presumably to the constraints that the change must be fair and reasonable, and it must achieve the purpose of the RMA.

(3) The High Court also stated[18]:

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change.

17 (1999) 5 ELRNZ 264 at 272 [1999] NZRMA 467 at 477.
18 [I 994] NZRMA 145 at 166.

At first sight the High Court seems to have rather diminished (but not eliminated) the importance of giving notice to landowners and other interested persons of changes sought by submissions. There is, after all, no formal requirement for service under the RMA in respect of proposed plans. However as will be seen shortly there are in fact other safeguards for such other parties in the scheme of the Act which affect what is "fair" in the plan preparation process.

[18] In the subsequent case Royal ***Forest & Bird Profecfion Society Inc v Southland District Council*** Pankhurst J. stated[19]:

> *... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

Both of the High Court cases were concerned with what relief could be granted even if not expressly sought as such in a submission. There was no direct issue in those cases as to whether the relevant submissions were sufficiently clear in themselves. I hold that the same general test applies – does the submission as a whole fairly and reasonably raise some relief, expressly or by reasonable implication, about an identified issue.

[19] I was referred to a number of Planning Tribunal and Environment Court decisions: ***Romily Properfies Lfd v Auckland City Council[20]; Biocycle (New Zealand) Ltd v Manawatu-Wanganui Regional Council[21]; Lovegrove v Waikato District Council[22]; Duchess of Rothesay v Transit New Zealand[23]; Atkinson v Wellington Regional Council[24]; Hardie v Waitakere City***

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19 [I 997] NZRMA 408 at 413.
20 Decision A95/96.
21 Decision W 148/96.
22 Decision AI 7/97.
23 Decision W33/98.
24 Decision W 13/99.

Council[25]***.*** All those cases turn on their own facts given the principle stated by the High Court in the ***Countdown*** and Forest ***and Bird*** cases so I can obtain no real guidance from them.

[20] The High Court's guidance in ***Counfdown*** is, with respect, very useful on the issue as to whether a Council may make changes not sought in any submission. It appears that changes to a plan (at least at objective and policy level) work in two dimensions. First an amendment can be anywhere on the line between the proposed plan and the submission[26]. Secondly, consequential changes can flow downwards from whatever point on the first line is chosen. This arises because a submission may be on any provision of a proposed plan[27]. Thus a submission may be only on an objective or policy. That raises the difficulty that, especially if:

(a) a submission seeks to negate or reverse an objective or policy stated in the proposed plan as notified; and

(b) the submission is successful (that is, it is accepted by the local authority)

- then there may be methods, and in particular, rules, which are completely incompatible with the new objective or policy in the proposed plan as revised. It would make the task of implementing and achieving objectives and policies impossible if methods could not be consequentially amended even if no changes to them were expressly requested in a submission. The alternative – not to allow changes to rules – would leave a district plan all in pieces, with all coherence gone.

[21] The danger in the proposition that a change to an objective or policy may lead to changes in methods – including rules which are binding on individual citizens – is that citizens may then subsequently protest with some justification that they had no idea that a rule which binds them could result from a submission on an objective.

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25 Decision A69/2000.

26 See paragraph [37] below for further discussion of this.

27 See paragraph 1 of the submission Form 3 set out earlier in this decision.

[22] In my view there are two answers to that. The simple, legalistic answer is that the operative date of a proposed plan as revised – with all consequential changes to rules included – needs to be notified[28] and copies made available at public libraries*' and in the local authority's office[30]. From that date every rule in a district plan has the force and effect[31] of a regulation under the Act.

[23] The second answer, attempting to answer questions as to the fairness of the procedure, relies on the various methods of attempting to advise citizens of the changes that might result from the submission process. I now turn to consider the procedure for the preparation (and change) of a district plan.

The place of submissions in the organisafion and format of the RMA?

[24] A submission is the first opportunity that ordinary citizens have to contribute to the preparation of a district plan[32]. The procedural requirements for preparation of a district plan are set out in the First Schedule to the Act. I will refer to those, to the extent necessary, shortly. First, however it is important to note the substantive requirements for a district plan, because they give some guidance as to what submissions may try to achieve.

[25] Every district in New Zealand must have a district plan[33] at all times. A territorial authority[34] must[35]:

> *... prepare and change its district plan in accordance with its functions under section 31, the provisions of Pat-t II [and] its duty under section 32 . . . .*

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28 Clause 20 of the First Schedule to the RMA.
29 Clause 20(5) of the First Schedule to the RMA.
30 Section 35 RMA.
31 Section 76(2) RMA.
32 Or regional plan or policy statement; for brevity in this decision we refer only to a "district plan" or "proposed plan".
33 Section 73(1) RMA.
34 Similar obligations apply to regional councils as local authorities: sections 61 &66 RMA.
35 Section 74 RMA.

[26] The contents of a district plan must state, amongst other things[36]:

> *(a) The significant resource management issues of the district; and*
> *(b) The objectives sought to be achieved by the plan; and*
> *(c) The policies in regard to the issues and objectives, and an explanation of those policies; and*
> *(d) The methods being or to be used to implement the policies, including any rules; and*
> *(e) The principal reasons for adopting the objectives, policies, and methods of implementation set out in the plan; and . . .*
> [My underlining].

[27] The unique nature of a district plan as "a living and coherent social document"[37] is identified in sections *74* and 75 of the Act: it must identify objectives and policies which are not directly binding on individual citizens at all: ***Auckland Regional Council v Norfh Shore City Council[38].*** Further a district plan does not need to contain any rules. It usually does but rules are only one category of method that can be used.

[28] Objectives and policies can be general or specific. As Cooke P (as he then was) stated when giving the decision of the Court of Appeal in ***Auckland Regional Council v North Shore City Council[39]:***

> *It is obvious that in ordinary present day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday*

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36 Section 75 RMA.
37 ***(1984) J Rattray & Son Ltd v Christchurch City Council*** 10 NZTPA 59 (CA) per Woodhouse P. (this phrase was applied to a plan under the Town and Country Planning Act 1977; but it has been held to apply with equal accuracy to plans under the RMA).
38 [1995] NZRMA 424 at 431 (CA).
39 [I 995] NZRMA 424 at 430 (CA).

New *Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific.*

[29] The hierarchical nature of a district plan is clear: the methods must implement[40] or achieve[41] the objectives and policies of the plan: ***Beach Road Preservation Society Inc v Whangarei District Court***[42].

[30] Clause 6 is part of the First Schedule to the Act. The First Schedule comprehensively sets out the procedure for the preparation of proposed plans and policy statements under the RMA. As such clause 6 is one step in the process started under Part V of the RMA and continuing with the process set out in Part I of the First Schedule to the Act from preparation under clause 2 to the date a district plan becomes operative under clause 20.

[31] A submission has an important continuing role in the preparation of a plan as shown by reference to the following (relevant) clauses of part I to the First Schedule:

- Clause 7 Public notice of a summary of all submissions must be given;
- Clause 8 Further submissions may be made, supporting or opposing a primary submission made under clause 6;
- Clause 8B A hearing into all the submissions must be held by the local authority (and a decision issued under clause IO);
- Clause 14 Any person who made a submission may lodge a reference in the Environment Court *"if that person referred to that provision or matter in that person's submission ..."*.

40 Section 75(l)(d) RMA.
41 Section 76(l)(b) RMA.
42 [2001] NZRMA 176 at para [39].

- Clause 16A A local authority may initiate a variation to a proposed plan.

[32] The clause 7 summary is important and has been the subject of various decisions which hold that if the summary is inaccurate or unfair or misleading then an amended summary may need to be renotified e.g. Re ***Christchurch City Council (Montgomery Spur)***[43]; ***Re an Application by Christchurch International Airport Ltd and Another***[44]***; re an Application by Banks Peninsula District Council***[45]***.***

[33] For present purposes it is important to note that for a person who is interested to know whether there are any submissions seeking changes to the provisions of a proposed plan that concern them, the clause 7 summary is where they start. So if the summary prepared by the Council is fair, accurate and not misleading, then readers are not initially disadvantaged. Thus I consider ***Romily Properfies Limited v Auckland City Council*** may have overstated the position when the Court stated[46]:

> *People who may wish to oppose a submission or appeal, or to propose some modification to the relief sought, have* ***only*** *the original documents from which to learn what is the scope of the possible amendments that might be made to the proposed instrument . . .* [My emphasis].

As I have stated above, there is another, earlier, source for ascertaining the scope of a submission: the Council's summary of that submission.

[34] I respectfully prefer the approach of the Environment Court in ***Lovegrove and Others v Waikato District Council***[47]***.*** In that decision the Environment Court was concerned with three references on the respondent's proposed

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43 (1999) 5 ELRNZ 227.

44 Decision C77/99 confirmed by the High Court on appeal under the name ***Health/ink South Ltd v Christchurch City Council*** [2000] NZRMA 375.

45 Decision C27/2002.

46 Decision A95/96 at p.6.

47 Decision Al 7/97.

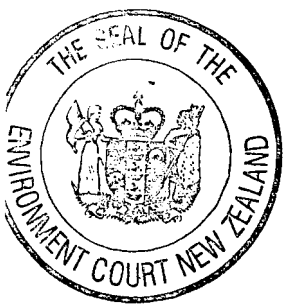
district plan. One of the references by a Mr Austin was based on a submission prepared by Mr Austin himself which stated[48]:

> *I support the plan to allow sub-division of the rural zoned area of Windmill Road.*
>
> *...*
>
> *The size of farmlet blocks as above which comprises . . . nearly 1/3 in gully is not sufficient size to make it viably commercial. I seek subdivision be allowed due to strong demand for smaller blocks in this area.*

Mr Davis was fortunate that the Council staff included his submission in the summary relating to the Rural Residential zone[49].

[35] The Court stated[50]:

> *A planning authority, and this Court too, would wish to give a broad interpretation to a submission prepared without professional assistance if it is capable of being understood, provided that in doing so no one else is prejudiced. In this case there is no risk of prejudice of others.*
>
> *A submission has to inform the planning authority with particularity what amendment is sought to the proposed instrument. The words from Mr Austin's submission already quoted do not themselves convey that he* was *seeking that his property be rezoned Rural Residential. Even so, the Council officials evidently divined that this was what he was seeking, and apparently they were correct. Even though Mr Austin did not attend to clarify what he was seeking, the submission* was *considered by the committee on that basis and, in addition to stating that the submission could not be accepted because it was not specific enough, the committee also gave a decision rejecting the submission on the merits.*



48 Decision Al 7/97.
49 Decision Al 7/97 at p. 11.
50 Decision Al 7/97 at p. 13.

In those circumstances we accept Mr Clark's contention that although it was *wanting in particularity, the submission was sufficient that it could be and was understood. We also accept that Mr Austin acted in good faith.*

For those reasons we do not dismiss Mr Austin's appeal for the reason that it seeks relief which was not specifically sought in the submission. However we take the oppottunity to state again that in general the wording of a submission sets the limits of the relief that can be granted, as it may be relied on by others who may wish to support or oppose the submission.

[36] Mr Davis' situation in Lovegrove raises the issue as to what happens when a summary of a submission is fair and accurate, but the submission itself is less so. The Court appears to have held that other persons who were not parties to the appeal were not prejudiced because they had been put on notice adequately by the Council's summary.

[37] Clause 14 of the First Schedule needs to be emphasised since the scope of a reference is bounded by the submission(s) at one end and the notified plan at the other. In Re ***Vivid Holdings Ltd*** the Environment Court stated[51]:

... in order to start to establish jurisdiction a submitter must a raise a relevant 'resource management issue' in its submission in a general way. Then any decision of the Council, or requested of the Environment Court in a reference, must be:

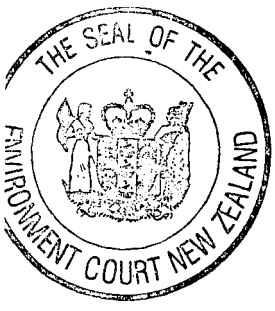
(a) fairly and reasonably within the general scope of:
(i) an original submission; or
(ii) the proposed plan as notified; or
(iii) somewhere in between
provided that:
(b) the summary of the relevant submissions was fair and accurate and not misleading.

[51] (1999) 5 ELRNZ 264 at para 19.

[38] *I* now turn to two provisions which are important factors in considering whether a submission **fairly** raises certain relief. Under clause 16A of the First Schedule to the Act a local authority has the power to initiate a variation to a proposed plan at any time before the plan is approved. There are no restrictions on why a council may choose to do that. Obviously one reason might be that a council wished to promote provisions in a proposed plan which no party had requested. Another case is where a party has asked for some general relief in its submission and a local authority considers that other parties should be warned as to precisely what is proposed to be amended in the proposed plan. For present purposes the important aspect of the variation procedure is that it involves further notification of the proposed amendments to the notified plan, since the First Schedule procedure applies to the variation as if it were a plan change[52]. Thus it is in a local authority's power to ensure fairness by notification of any amendments to a proposed plan that have not already been notified.

[39] In ascertaining the place of clause 6 not just within the First Schedule but also in the scheme of the Act as a whole it is important to recognise that, if a reference is lodged in the Environment Court so that it is seized of an aspect of a proposed plan then this Court has additional powers to change a plan. Section 293 of the RMA states [relevantly]:

> ***293. Environment Court may order change to policy statements and plans***
>
> *(1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.*
>
> *(2) If on the hearing of any such appeal or inquiry, the Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider*



[52] Clause 16A(2) of the First Schedule.

the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.

(3) As soon as reasonably practicable after adjourning a hearing under subsection (2), the Court shall –

(a) Indicate the general nature of the change or revocation proposed and specify the persons who may make submissions; and

(b) Indicate the manner in which those who wish to make submissions should do so; and

(c) Require the local authority concerned to give public notice of any change or revocation proposed and of the opportunities being given to make submissions and be heard.

...

In *Vivid* the Court stated[53]:

... the Court has the wide power in section 293 of the Act to change any provision of a plan when hearing a reference to the Court. Certainly this power is exercised cautiously and sparingly, but its existence suggests that if the Court is concerned that other interested persons should be heard then it can remedy that by directing notification under section 293(2). I consider that one of the reasons Parliament has given the Environment Court the powers in section 293, especially in section 293(2) is to cover the situation where the relief the referrer is seeking is not spelt out in adequate detail in the submission and/or the reference. Obviously it is good practice to spell out precisely the relief sought, but it is not essential to do so. If it is not and the Court considers a reasonable case for a particular change to a proposed plan is made out but that interested persons have not had adequate notice – because the relief was not stated, or not clearly – then the Court can exercise its powers under section 293(2).

53 (1999) 5 ELRNZ 264 at para 28.

[40] The wider scheme of the Act also needs to be considered, including the purpose of sustainable management of natural and physical resources[54]. Indeed references (and their relative submissions) have been struck out as not relevant to the purpose of the Act: Winter ***and Clark v Taranaki Regional Council***[55].

[41] Another relevant part of the RMA is Part III setting out duties and restrictions under the Act. Ms Dewar submitted that section 9 of the RMA entails that there are no restrictions on land use under the Act unless a plan provides them (cf ***Marlborough Ridge Ltd v Marlborough District Council***[56]). She then argued that if a submitter seeks to impose extra, or at least different, restrictions on landowners then both the land in question and the proposed restrictions should be clearly identified. I agree that providing fair notice to landowners of possible changes affecting their land is important. But what is fair must be assessed in the context of the RMA's format and scheme as already discussed.

[42] In summary, in relation to the first two steps of the analysis I need to carry out, I come to the conclusions that as to whether a submission **reasonably** raises any particular relief the following factors need to be considered:

(1) the submission must identify what issue is involved (***Vivid***[57]) and some change sought in the proposed plan;

(2) the local authority needs to be able to rely on the submission as sufficiently informative for the local authority to summarise it accurately and fairly and in a non-misleading way ***(Montgomery Spur***[58]);

(3) the submission should inform other persons what the submitter is seeking, but if it does not do so clearly, it is not automatically invalid.

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54 Section 5 of the RMA.
55 [1998] 4 ELRNZ 506.
56 [1998] NZRMA 73 at 79.
57 (1999) 5 ELRNZ 264 at para 19.
58 (1999) 5 ELRNZ 227.

[43] As to the **fairness** of the relief sought, there are four safeguards for the rights of landowners and the interests of other parties by giving them notice of what is proposed:

(1) other parties' knowledge of what a submitter seeks comes first (usually) from the local authority's summary of submissions; and

(2) if it becomes clear to a local authority – at any time before it reaches a decision on submissions – that the summary of submissions is not accurate about a submission then it can apply to the Environment Court for an enforcement order directing renotification. That was the responsible course taken by the local authority in ***re an Application by Banks Peninsula District Council***[59]***;***

(3) if the local authority considers that a summary of a submission was accurate, and the submission should be accepted, but that consequential changes to rules or other methods are necessary, then it may promote (and notify) a variation under clause 16A of the First Schedule to the Act;

(4) if there is a reference that is based on a reasonable submission but it appears fairer to give further notification then the Environment Court has its section 293 powers to ensure by notification that persons not yet before the Court have an opportunity to be heard: ***Romily v Auckland City Council***[60]***; re an Application by Vivid Holdings Ltd***[61]***.***

[44] There is one gap in the RMA's scheme. It appears to be open to a local authority to make consequential changes to rules as a result of a general submission on an objective or policy which the local authority accepts in its decision. If a party failed to lodge a further submission"* and subsequently reads the proposed plan as revised (and finds it very different from the proposed

59 Decision C27/2002.
60 Decision A95/96.
61 [I 999] NZRMA 467.
62 Under clause 8 of the First Schedule to the RMA.

plan as notified) then they have no remedy under the RMA. Only a submitter[63] may refer an issue to the Environment Court. Any disaffected non-submitter needs to bring judicial review proceedings in the High Court. This lacuna suggests that it might be fairer and a realistic recognition of the scope of possible consequential changes to methods or plans to amend the First Schedule of the Act to allow a non-submitter to lodge a reference on amended methods (but not objectives or policies) changed by a local authority as the result of a submission on an objective or policy which did not expressly seek a change to the rules.

The extent ***of the breach***

[45] For her landowner clients Ms Dewar submitted that the description in the submission of both the land affected and of the relief sought was so vague and uncertain that the submission was a nullity. Further, a submission on Volume 2 of the proposed City Plan could not reasonably be read as a submission seeking to change the zoning of land in the planning maps (in particular Map 55A). She also submitted that the submission when it referred to Mt Pleasant could not reasonably be read as referring to land on Monck's Spur.

[46] For Mrs Campbell, Mr Cuthbert submitted that if the submission is looked at as a whole, these aspects are apparent:

(1) The submission is about four issues, one of which is "Protection of the Port Hills, including comments on Hills Housing and its expansion";
(2) There is a separate heading "Protection of Port Hills" and all the relevant submissions are under that heading;
(3) The subheading "Volume 2: Objectives: p.2/22" is separate from the separate issue "Rules";

63 Clause 14 of the First Schedule to the RMA (there are exceptions for requirements under clause 4 for public utilities).

(4) "Rules" are not given a subheading on a new line in the submission, but are emphasised as **"Rules";**

(5) The Living Hills zone(s) are identified as "the extension of Mount Pleasant"; and

(6) The relief applicable is "That these developments be withdrawn from the City Plan and be returned to the RuH zone"; and

(7) Further, that one of Mrs Campbell's main criticisms of the notified plan was that while it contained an objective to avoid or mitigate adverse effects of development on the Port Hills:

> ... *buildings are controlled* as *to their appearance, siting, location and scale ...*
>
> *In fact this is not carried through in the Rules. ...*

(8) The logic of the submission is that if such rules (Mrs Campbell calls them "guidelines") cannot be introduced as she requests, then the land in question should be returned to a RuH zoning.

[47] For the Council Mr Hardie advised that on this issue the Council abided the decision of the Court. However to assist the Court he pointed out that the obligations on a Council to summarise submissions[64] in a way that is fair, accurate and not misleading[65] is quite onerous. Consequently there must be, he submitted, minimum standards of accuracy on a submitter, so that there is some material to be accurately and fairly summarised.

[48] Map 55A as it was in the notified plan shows land in relevant zones:

- Living Hills ("LH") zone on either side of Mt Pleasant Road;
- Living Hills A ("LHA") on either side of Monck's Spur Road; and
- Living Hills A ("LHA") between Monck's Spur Road and Mt Pleasant Road:

64 Under clause 7 of the First Schedule to the RMA.

65 See ***re*** an ***Application by the Christchurch City Council (Montgomery Spur)***(1999) 5 ELRNZ 227 at 235.

- The upper slopes of the Port Hills as Rural Hills ("RuH").

[49] While I appreciate the thoroughness of Mr Cuthbert's analysis I am left with the thought that it would have been simple for the submission to have requested as relief:

> *That all the land on Mount Pleasant and Monck's Spur shown as LH or LHA be rezoned as RuH.*

[50] In fact the submission is unclear as to which land or even which zones are to be rezoned to Rural H. Although the Council has inferred that Mrs Campbell's submission related to the LHA rather than LH zone and has summarised it accordingly I can see no reason for that. Similar considerations apply to the second and third limbs of Port Hills relief requested by Mrs Campbell. She requests guidelines for "general structure and colours" in "such -visible ENVIRONMENTAL SITES". Again if she had stated "in the LH or LHA zones" other persons may have been much more readily able to tell what land Mrs Campbell was referring to. As for the relief that above the 160 metre contour (which is shown on the planning maps in the notified plan) "any building will be a notifiable act", that too is silent as to what land it applies to. On its face it applies to all land on the Port Hills regardless of zone.

[51] Despite those difficulties I find that Mrs Campbell's submission does **reasonably** raise an issue about, and a request for rezoning of Living Hills and LHA zoned land in the general Mount Pleasant area (and elsewhere).

[52] If I was simply looking at the submission itself, I would find that applying the non-legalistic approach identified in ***Countdown*** and the ***Forest and Bird*** cases, that while the relief sought (read in the context of the submission as a whole) does reasonably raise the rezoning of the land zoned LHA and LH on Mt Pleasant and Moncks Spur it does not **fairly** do so. However, that is not the correct approach.

[53] I consider that I should look at the submission in the light of the Council's summary of submissions[66] and the place of a submission in the scheme of the Act. It is a tribute to the sympathetic and careful work of the relevant Council officer(s) that they have managed to spell some coherent relief out of Mrs Campbell's submission. For example the references to Mt Pleasant, Worsley's Spur and "above Halswell Quarry" have been translated into summaries in respect of the three relevant planning maps – 55A, 59A and 60A – for rezoning of LHA and LHB zones to the RuH zone. I have already noted there is a restriction in the ostensible scope – Mrs Campbell's submission could have been read so as to be a request that land in the LH zone as well as in the LHA zone was to be rezoned, but the Council has not read the submission in that way. Similarly, the request that all building above the 160 metre contour be notifiable has been read as applying to the Rural Hills zone only.

What is the actual effect of the breach?

[54] Ms Dewar submits that because the submission is so unclear, a number of landowners on Mount Pleasant and Monck's Spur whose land is zoned LHA or LHB in the revised plan may not be parties to this reference concerning their land. There are two answers to that:

(a) The Council's summary showed that (in the Council's view) Mrs Campbell sought that all land in the area zoned LHA[67] in the notified plan be rezoned as Rural Hills;

(b) If the Court hears the merits and decides Mrs Campbell has made a reasonable case for change, it can direct notification under section 293 of the Act.

66 As summarised in the schedule in para [IO] above.

67 They could have added the land zoned "LH" as well, but for some reason chose not to do so

Overall Assessment of the Submission

[55] In assessing whether Mrs Campbell's submission fairly and reasonably seeks to rezone land on Mt Pleasant Spur as Rural Hills I need to take into account the matters identified in paragraphs [42] and [43]. In the circumstances of this case these translate to the following considerations:

(1) that the submission should be read as a whole and in the light of the submission's place in the plan preparation process;

(2) the RMA's encouragement of laypersons being involved in the process;

(3) that my approach should be non-legalistic and realistically workable;

(4) that on the issue of fairness there are two safeguards – first affected landowners and other interested persons could rely on the Council's summary of submissions to advise them what the submission seeks; i.e. rezoning from LHA or LHB to RuH of the land on Map 55A; secondly if Mrs Campbell makes a reasonable case for change of the proposed plan then there is the section 293 procedure by directing further notification, thus allowing affected landowners and interested persons to join the proceedings;

(5) that the purpose of the Act may be met by enabling the submission, or rather the consequential reference to be heard because there are, potentially, matters of national importance involved. (In ***Flanaghan v Christchurch City Council***[68] the Environment Court found the Port Hills to be "an outstanding natural landscape and feature").

[56] While it is a close-run decision I hold that the submission does fairly and reasonably raise rezoning of the land identified on map 55A as LHA to RuH. It will be obvious that in coming to that conclusion I regard the Council's summary

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68 Decision C222/2001.

and the possibility of section 293 notification as being of decisive importance in this particular case.

The reference

[57] Mrs Campbell's woes do not end with a challenge to her submission. The primary challenge of Ms Dewar, at least initially, was as to the scope of Mrs Campbell's **reference.** Her argument was that while the submission (if it is valid) raises three points about the Port Hills provisions of the proposed plan viz:

(1) Rezoning some land from LHA and LHB to RuH;
(2) Specifying design controls in the rules;
(3) Notified applications for buildings above the 160m contour

- the reference only requests relief (1). The problem then is that the evidence now circulated for Mrs Campbell apparently accepts that the relevant land on Mt Pleasant and Monck's Spur should retain a LHA or LHB zoning. Instead of seeking an RuH zoning it suggests design and landscaping controls should be imposed.

[58] Ms Dewar submits that such controls, introduced as zone rules, are unacceptable for two reasons. First it would treat the LHA or LHB zoned land on Mt Pleasant Spur (and possibly on Worsleys and Kennedys Bush Spurs) as separate subzones with different rules from LHA and LHB zones elsewhere on the Port Hills. Secondly the Court would be reinstating relief expressly claimed in the submission but not in the reference. She submitted that would be quite wrong.

[59] I cannot accept Ms Dewar's first submission. It is always open to a party to argue on the merits, that different land should be zoned differently. The fact that such relief might create a "spot zone", or a plethora of small subzones is an issue to be considered at a substantive hearing.

[60] The second issue is more complex. In general lesser (implicit) relief always comes with greater express changes sought by an appeal - see for example on a section 120 appeal: Upper ***Clutha*** Environmental Society ***Inc v Queenstown Lakes District Council***[69]. Can that apply where a reference appears, on its face, to have dropped relief sought in the original submission? Somewhat reluctantly, and bearing in mind the flexible, non-legalistic approach encouraged by the High Court I come to the conclusion that Mrs Campbell may even now, seek design and landscaping controls as specified in the evidence she is to call.

Summary

[61] In the circumstances I hold that both Mrs Campbell's submission and reference are valid and that she may call evidence as to design and/or landscaping controls on the hearing of the reference.

[62] The proceedings are adjourned for a further prehearing conference to plan for a hearing.

DATED at **CHRISTCHURCH** this 28th day of March 2002.

J R Jackson
Environment Judge

issued: - 2 APR 2002

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69 Decision C34/2002