BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 239

ENV-2009-WLG-000210

IN THE MATTER	of an appeal pursuant to Clause 14 of the First Schedule to the Resource Management Act 1991
BETWEEN	CEPHAS GROUP LIMITED Appellant
AND	TASMAN DISTRICT COUNCIL Respondent

Court: Environment Judge B P Dwyer sitting alone under s279 of the Act

Heard: in Chambers at Wellington

DECISION ON REQUEST BY APPELLANT TO AMEND RELIEF SOUGHT

Decision Issued: 08 OCT 2013

A: Application declined

B: Costs reserved

Introduction

[1] On 10 November 2009, Cephas Group Limited (Cephas) lodged an appeal against a decision of Tasman District Council (the Council) on a submission which Cephas had made to Change 10 (previously Variations 61, 62 and 63) to the Tasman Resource Management Plan (the District Plan).

[2] The appeal sought the following relief:

- *To add to Policy 6.6.3.12 the following:*
  - *(d) To ensure that the role of the existing Richmond town centre is not undermined as the central focus for retail and administrative activity and community interaction for Richmond.*

  or such alternative wording to ensure the same objectives are achieved;
- *Amend Rule 17.3.2.1(b)(i) for the purpose of providing clarity of administration and to reduce the potential that retail activities of less than 500m² becoming established in the Mixed Business Zone; ...*
- *The area proposed for the re zoning be amended to reflect the forecasted demand and be consistent with the Section 32 report.*

[3] The appeal remains unresolved, notwithstanding that it was lodged nearly four years ago. The reason for that is that the Council has been methodically working through a number of appeals relating to Change 10 and I understand that the Cephas appeal is the last remaining appeal to be resolved.

[4] In any event, on 20 March 2013 Cephas filed an application to amend its appeal document. A copy of the notice of the application is appended to this decision. In summary, the amended relief sought by Cephas is to:

- Introduce new rules with definitions of *Supermarket* and *Department Store* and a new non-complying activity status for Supermarkets and Department Stores in the Mixed Business Zone (MBZ) of the Richmond West Development Area (RWDA);
- Introduce mechanisms to address the supply of MBZ land in the RWDA.

I will return to these requested amendments in more detail in due course.

[5] Cephas' application to amend its appeal is opposed by the Council and by various s274 parties to the Cephas appeal, collectively referred to as the Richmond West Group.

Background

[6] Change 10 is a combination of a number of variations to the District Plan which (inter alia) proposed the creation of the MBZ on land to the northwest of the Richmond town centre to ensure that land would be available for future demand for commercial land in the Richmond vicinity. Cephas was one of a number of submitters to Change 10.

[7] Cephas' submission on Change 10 was in respect of three aspects of the Change: namely Chapter 6, Rule 17.2A.11 and Rule 17.2A.2(b)(i). The nature of the submission in each case including the relief sought under the submission was:

- *Chapter 6 - Whilst the discussion implies that the Central Business Zone is to remain the focus for commercial, retail, administrative and social activities normally associated with a town centre, this is not clearly articulated. It is important that there is a clearly stated policy that the existing Richmond Central business zone and its immediate fringe areas be maintained as a viable, vibrant and attractive place for people to do business, access services and socially interact. Policy should not leave opportunity for development of commercial activities in the Richmond West area to undermine the central business area.*

  The relief which Cephas sought was:
  Add to 6.7.17 a new policy (d) "To ensure that the role of the existing Richmond town centre is not undermined as the central focus for retail and administrative activity and community interaction for Richmond."

- *17.2A.11 Reasons for Rules (Retail activity) - This explanation/reason is supported.*

The relief which Cephas sought was:
Retain.

- *Rule 17.2A.2(b)(i) - The intent of the rule is supported but there is scope for the rule to be interpreted so that its purpose is circumvented. If the purpose is to limit establishment of retail activities below a certain floor area this should be more clearly stated.*

  The relief which Cephas sought was:
  Amend Rule 17.2A.2(b)(i) to read as: "No retail activity either as a single activity occupying an entire building or an individual tenancy or sub-tenancy in a multi-tenanted building shall have a gross retail display area less than 500 square metres, with the exception of the following retail activities..."

[8] In summary, the Cephas submission:

- Sought the addition of a new policy 6.7.17(d) to ensure that the role of the existing Richmond town centre was not undermined as the central focus for retail / administrative activity;
- Supported Rule 17.2A.11 and requested its retention;
- Sought the amendment of Rule 17.2A.2(b)(i) to require retail activities in the MBZ to have a minimum retail gross display area no less than $500m^2$.

[9] In addition to the submission which it filed in its own right, Cephas filed ten further submissions in support of submissions filed by other parties on Change 10. Most of the submissions which Cephas supported opposed the rezoning of an area at Beach Road from Light Industrial to MBZ. However, one of the submissions supported by Cephas was a submission filed by Gibbons Holdings Limited (Gibbons) which contained the following submission (inter alia):

- ***Section 6.5, 6.7 and Section 17.2A: Mixed Business Zone***
  The submitter is concerned about the wide range of business activities that may establish within the Mixed Business Zone. The zone provides for an unlimited quantity of restaurants, cafes, food takeaway outlets and

licensed premises, as well as the full range of professional offices and retail service activities. As a result of this the proposed mixed business zone has the potential to cause a significant adverse impact on the vitality, amenity and functioning of the current Central Business Zone.

Furthermore, the current Central Business Zone is made up of a range of both smaller speciality shops alongside are large format activities. While growth in the commercial sector needs to be provided for, the physical separation between the current Central Business Zone and proposed Mixed Business Zone will set up two commercial areas that may compete to the extent that is counterproductive to achievement of the purpose of this Act.

It is considered the function and makeup of the proposed Mixed Business Area should be more clearly distinguished with that of the existing Central Business Zone.

Decision Sought

Exclude the establishment of office and retail services from the Mixed Business Zone.

[10] Mr Allan contended that the part of Cephas' further submission which related to the Gibbons' submission was:

> 4. *The area of land proposed for Mixed Business use is excessive. There appears to be no sound basis for the area of mixed business land proposed and it does not make sense to have a planning strategy of displacing established industrial activities when Greenfield sites for future Mixed Business activities are available.*

[11] The issue before the Court is whether or not the contents of the documents described above support Cephas' request for amendment of its notice of appeal.

Jurisdiction

[12] There was some debate between the parties as to the Court's jurisdiction to amend the notice of appeal as requested by Cephas. Cephas' request for amendment was founded on the provisions of s267(3)(a) RMA. Both the Council and Richmond West Group query whether s267(3)(a) RMA is an appropriate vehicle for such

amendment. There are a number of provisions of RMA which enable the amendment of applications and other documents before the Court. They include:

- Section 267 (being the provision relied upon by Cephas in this case) which relevantly provides:

  267 Conferences

  (3) The member of the Environment Court presiding at any conference under subsection (1) may, after giving the parties an opportunity to be heard, do all or any of the following things:

  (a) Direct that such amendments to pleadings be made as appear to the member to be necessary;

- Section 269 which relevantly provides:

  269 Environment Court Procedure

  (2) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such manner as it thinks fit.

  (3) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.

- Section 278 which relevantly provides:

  278 Environment Court has powers of a District Court

  (1) The Environment Court and Environment Judges have the same powers that a District Court has in the exercise of its civil jurisdiction ...

  In turn, Rule 1.14.2 of the District Courts Rules 2009 relevantly provides:

  The court may, at any stage of a proceeding, make, either on its own initiative or on the application of a party to the proceeding, any amendments to any pleading or the procedure in the proceeding that are necessary for determining the real controversy between the parties.

[13] Even acknowledging the somewhat unusual aspect of an application being made under s267(3)(a) as Cephas purports to do in this case, I have no doubt that any one of the provisions cited above gives this Court the ability to allow or direct amendments to be made to pleadings before it. Additionally, the Court must have an inherent jurisdiction to manage proceedings which would enable amendments as requested. Even if Cephas may have nominated the wrong statutory provision that would not preclude the Court allowing the application under another head. At the heart of the Court's considerations in determining such an application are ss269(1) and (2) which allow the Court to regulate its own proceedings and require that Court proceedings are conducted without procedural formality where that is consistent with fairness and efficiency.

[14] I am more than satisfied that there is general jurisdiction to amend proceedings as requested by Cephas. The determinative issue in this case is whether or not the amendments sought by Cephas are within scope and I now turn to that issue.

Scope

[15] The provisions of particular relevance in this case are found in Clause 14 Schedule 1. Clause 14(1) enables a person who made a submission on a proposed plan to appeal to the Environment Court in respect of provisions or matters included or excluded from the proposed plan. The subject matter of the appeal is however constrained by the provisions of Clause 14(2) which relevantly provided (at the time of submission):

> *(2) However, a person may appeal under subclause (1) only if the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.*

[16] The provisions of Clause 14 have been the subject of a number of decisions of both this Court and the High Court. Counsel helpfully referred to relevant decisions. I do not propose to recite all of the authorities here. It appeared to me to be common ground between the parties in this case that the determinative issue as to whether or not Cephas might be allowed to amend its notice of appeal as it has requested, is whether or not the amendments sought fall *fairly and reasonably* within

the general scope of Cephas' original submission (which could be either its primary submission or its further submission)[1].

[17] When assessing whether or not the amendments sought by Cephas fall fairly and reasonably within the scope of its originating documents, it is necessary to take a realistic and workable approach rather than one founded on legal nicety[2]. I will endeavour to determine Cephas' application in light of those requirements.

[18] Dealing first with the amendment proposed by Cephas which seeks to constitute Supermarkets and Department Stores non-complying activities within the RWDA, I observe that no such relief was sought in either Cephas' submission or further submission. That is not necessarily fatal to the proposed amendment. It is clear from the authorities that a party is not necessarily restricted in the matters it can raise on appeal by the express words of a submission.[3] Consequential changes which logically arise from the grant of relief requested in submissions are also permissible provided they are reasonably foreseeable[4].

[19] The heart of Cephas' primary submission on Change 10 was the contention that *...It is important that there is a clearly stated policy that the existing Richmond Central business zone and its immediate fringe areas be maintained as a viable, vibrant and attractive place for people to do business, access services and socially interact. Policies should not leave opportunity for development of commercial activities in the Richmond West area to undermine the Central business area.* In order to achieve that outcome Cephas requested the addition of a new Policy 6.7.17(d) ... *To ensure that the role of the existing Richmond town centre is not undermined as the central focus for retail and administrative activity and community interaction for Richmond.*

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[1] CF *Vivid Holdings Limited* (1999) 5 ELRNZ 264, [1999] NZRMA 468 at paras 18 and 19.

[2] *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC).

[3] *Westfield (New Zealand) Limited v Hamilton City Council* (2004) 10 ELRNZ 254, [2004] NZRMA 556 (HC) at para [73].

[4] *Westfield* at paras [73] - [77]

[20] The submission was clearly directed at policy issues and sought a specific policy outcome. There is nothing in the submission which might fairly give rise to any expectation that consequent rule changes might be required, particularly not the rule now proposed which identifies two specific activities (Supermarkets and Department Stores) and seeks that they become non-complying activities within the RWDA. I do not consider that the addition of the proposed rule can be said to fairly and reasonably arise from Cephas' submission nor to be a foreseeable consequence of that submission being upheld.

[21] In general terms, I agree with the proposition advanced on behalf of Cephas that it is desirable to have rules which give effect to the policies in a plan but I do not accept that the specific rule proposed by Cephas is a foreseeable consequence of imposition of the policy requested by Cephas in this instance. I would go further and say that it is clear on a plain reading of the Cephas submission in a realistic and workable fashion that the submission was directed at a policy outcome only and did not seek any consequential rule changes.

[22] The second amendment sought by Cephas seeks:

The implementation of rules as would ensure an availability of a supply of land for the purposes required at a rate which more directly relates to demand and need.

[23] Before considering whether the amendment falls within scope of Cephas' original submission documents, I observe that I do not agree to it in any event. It is impossible to glean from reading the proposed amendment, the nature of the rules which Cephas seeks to have implemented in anything other than the vaguest of terms. I do not consider that the amendment gives adequate notice to other parties or to people who may potentially have an interest in the matter, just what it is that Cephas proposes.

[24] Setting aside its merits, I do not consider that the proposed amendment is within scope. It does not arise out of the Cephas primary submission. It is arguable that the amended appeal relief Cephas seeks (see para [2] above) may be sufficiently related to Cephas' further submission (see para [10] above) to be within scope.

However, I do not consider that Cephas' further submission arises lawfully out of the Gibbons submission. Clause 8 of Schedule 1 (applicable as at the date of filing the Cephas further submission in June 2008) provided:

> *Any person, including the local authority in its own area, may, in the prescribed form, make a further submission to the relevant local authority, but only in support of or in opposition to those submissions made under clause 6 on a proposed policy statement or plan.*

[25] The relevant part of the Gibbons' submission identified as being the subject of further submission by Cephas is that identified in Para [9] above. The Gibbons' submission was specifically on the range of business activities which might be established within the MBZ and sought the exclusion of certain activities from that zone. Cephas' further submission was directed at the area of land to be included in the MBZ which is a different matter altogether and does not appear to either support or oppose the Gibbons' submission on the range of activities which should be permitted in the zone.

[26] When Cephas' further submission is read in its entirety and in the context of the 10 submissions which it was supporting, it is apparent that the further submission was in support of submissions opposing the inclusion of a specific existing industrial area within the MBZ. I do not consider that the proposal to include rules in the District Plan controlling the rate at which land might be made available in the MBZ, fairly or reasonably relates to or is a reasonably foreseeable consequence of the further submission.

Section 293 RMA

[27] Finally, I refer to the provisions of s293 RMA which relevantly provides:

> ***293 Environment Court may order change to proposed policy statements and plans***
>
> *(1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the Court may direct the local authority to—*
>
> *(a) prepare changes to the proposed policy statement or plan to address any matters identified by the Court:*

> (b) *consult the parties and other persons that the Court directs about the changes:*
>
> (c) *submit the changes to the Court for confirmation.*

[28] Mr Allan suggested that even if Cephas' amendments were found not to be within scope, Cephas may still ask the Court to consider these issues and make directions accordingly pursuant to s293 at the conclusion of the appeal. He submitted that it was responsible to raise these issues and have them incorporated in the proceedings now rather than later as that would lead to duplication of evidence and hearing time.

[29] Although I understand the rationale for Mr Allan's submission I have concerns about the use of s293 in the manner suggested:

- Exercise of the powers contained in s293 is essentially driven by the Court. There can be no guarantee that the Court will choose to use its discretion to do so in any given instance. Although the Court's discretion must be exercised in a principled fashion, I do not consider that a party may require the Court to consider exercising the discretion;
- The power under s293 is exercisable after hearing an appeal. I do not consider that it can be exercised in anticipation to allow amendment of proceedings and consideration of issues which are not otherwise before the Court.
- I have reservations as to the basis on which Cephas can put evidence before the Court which might lead it to conclude that there is a reasonable case to direct changes of the kind requested by Cephas, when these issues are outside the scope of the appeal;
- Rules restricting the rate of release of land for business purposes potentially raise issues of considerable complexity and wide ranging effect. I have reservations about bringing down such rules late in the day under s293.

For these reasons, I do not consider that s293 provides a mechanism to amend the proceedings at this time.

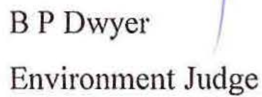
Outcome

[30] I decline the application to amend the notice of appeal.

Costs

[31] Costs are reserved to be dealt with on resolution of these proceedings.

DATED at Wellington this 7th day of October 2013



B P Dwyer
Environment Judge