ORIGINAL

Decision: W 12 /2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application under s85 of the Act

BETWEEN	FORE WORLD DEVELOPMENTS LIMITED and BAYSIDE VILLAS LTD
	(RMA 0860/03)
	Applicants
AND	THE NAPIER CITY COUNCIL
	Respondent
AND	THE HAWKES BAY REGIONAL COUNCIL
	Section 274 party

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson sitting alone under s279

RULING ON PRELIMINARY ISSUE OF INTERPRETATION OF s85 AND APPLICATION FOR A STAY/ADJOURNMENT

Section 85 interpretation

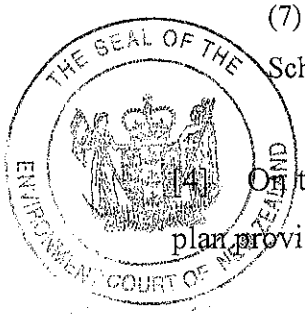
[1] The applicants have sought Orders under s85(3) and cl 21 of the First Schedule to the Resource Management Act 1991, directing the respondent Council to modify various aspects of its proposed district plan, insofar as it concerns land owned by them at Bay View, north of Napier City. In terms of s85(3), the applicants claim that the inclusion of some of that land within the proposed coastal hazard zone (CHZ) renders the land incapable of reasonable use, and places an unreasonable and unfair burden upon them, as its owners. The Council disputes both of those contentions. I dealt with some of the history of the matter in an earlier ruling about service. Additionally, the Court dealt with some distantly related issues in its recent decision W008/2005.

[2] Mr Lawson for the City Council, and Mr Milne for the Regional Council both submit that the Court does not yet have jurisdiction to hear a s85 application, essentially because the relevant Plan is not yet operative. Additionally (or alternatively) they submit that the Court should wait until the Council has made its decisions on a relevant variation to the Proposed Plan, so that it has all relevant information and disputed decisions before it, and can deal with

them all. That, they argue, would be an efficient and economical way of resolving the issues about the CHZ as it affects the applicants' land at Bay View. Mr Cavanagh, counsel for the applicants, strongly opposes either course.

[3] Section 85 is inconsistently drafted and is not easy to follow. It provides as follows:

> **Compensation not payable in respect of controls on land**
>
> (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.
>
> (2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—
>
> (a) In a submission made under Part 1 of the First Schedule in respect of a proposed plan or change to a plan; or
>
> (b) In an application to change a plan made under clause 21 of Schedule 1.
>
> (3) Where, having regard to Part 3 (including the effect of section 9(1)) and the effect of subsection (1), the Environment Court determines that a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Court, on application by any such person to change a plan made under clause 21 of Schedule 1, may—
>
> (a) In the case of a plan or proposed plan (other than a regional coastal plan), direct the local authority to modify, delete, or replace the provision; and
>
> (b) In the case of a regional coastal plan, report its findings to the applicant, the regional council concerned, and the Minister of Conservation, which report may include a direction to the regional council to modify, delete, or replace the provision.
>
> (4) Any direction given or report made under subsection (3) shall have effect under this Act as if it were made or given under clause 15 of Schedule 1.
>
> (5) In subsections (2) and (3), a " provision of a plan or proposed plan" does not include a designation or a heritage order or a requirement for a designation or heritage order.
>
> (6) In subsections (2) and (3), the term " **reasonable use**", in relation to any land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant.
>
> (7) Nothing in subsection (3) limits the powers of the Environment Court under clause 15 of Schedule 1 on an appeal under clause 14.



[4] On their face, the provisions of s85(2) give a landowner two routes of challenging the plan provision which is said to be causing the problem. First, there can be a submission under

Part 1 of the First Schedule. Part 1 relates, as its heading indicates to the ...*Preparation and change of ...plans by local authorities.* That is, it relates to plans at the time they are proposed, and, by reference, to proposed changes to operative plans.

[5] Secondly, the plan provision can be challenged in an application to change a plan made under Cl 21 of Schedule 1 (presumably a shorthand reference to the First Schedule). Cl 21 is contained in Part 2 of the First Schedule. Its heading tells us that Part 2 relates to ...*Requests for Changes to ...Plans of local authorities* ... . So, taken that far, s85(2) provides an opportunity to challenge a plan provision before, and after, a Plan becomes operative.

[6] But it is when s85(3) is considered that interpretation becomes difficult. It speaks of the Court determining that ...*a provision or proposed provision of a plan or proposed plan*...falls within the section, but then speaks of that determination being made in the context of an ...*application*...*to change a plan made under clause 21 of Schedule 1*.... As we have already seen, an application under clause 21 is an application to change an operative plan, so there is an internal inconsistency. The inconsistency is continued into para (3)(a), which again speaks of a ...*plan or proposed plan*... being modified etc at the direction of the Court.

[7] The only way I can see of making sense, and something workable, of this section is to read it as adopting a common (ie the clause 21) procedure for the Court (as opposed to the local authority) to hear applications under s85(3) in respect of both proposed and operative plans. I have to assume that the reason for that is that it allows persons who did not make a submission at the time the proposed plan was notified to apply. The right of appeal to the Court in respect of proposed plans is clause 14, and that confines the right to ...*a person who made a submission on a proposed*...*plan*... which would make it an unsuitable vehicle for an application under s85 for a person who had not done so.

[8] This is not quite the point discussed in *Re an application by Steven* (C125/97), or *Mullins v Auckland CC* (A35/96), but the result seems compatible with the approach in *Steven* at least.

[9] The point is certainly not as clear as one would wish. But for those reasons I would hold that the s85 procedure is available to an applicant who claims that land has been rendered

incapable of reasonable use, and that thereby an unfair burden has been imposed, by the provisions of a proposed plan, as well as an operative plan.

Stay/adjournment

[10] There is a separate issue, specific to this set of litigation and that is whether, as the Councils submit, it is inappropriate to hear this application in isolation from appeal RMA 0674/02, and before the Council has heard and decided upon the submissions to Variation 3. Such a course is also strongly opposed by Mr Cavanagh.

[11] To put the issue in context, a little history is necessary. At the heart of this dispute is the existence and the extent of the Coastal Hazard Zone (CHZ) imposed on the coastal strip north of Napier City and extending as far as the Esk River mouth, as part of the Proposed Plan notified in 2000. The extent of the CHZ was revisited after a further report in 2002. The result of that reconsideration affected the applicants' land, and a reference appeal, (RMA 0674/02) was lodged by them. It has not yet been heard.

[12] Variation 3 to the Proposed Plan was notified in April 2003, proposing changes to the extent of the CHZ. The applicants have lodged a submission seeking removal of the CHZ from their land, and/or alternative relief. The Council has yet to hear those matters; I am informed that a hearing is likely in the first quarter of this year.

[13] Once that history is understood, the case for adjourning the s85 application to await the outcome of the Variation 3 hearings becomes almost overwhelming, as does the case for hearing RMA 0674/02 simultaneously. If that is not done it is entirely possible that the outcome would be:

- the Court will hear the s85 application, at considerable expense for the parties and the use of scarce hearing time;
- come to the view that as the Proposed Plan presently stands the s85 grounds are made out;
- but then have to say that until the Variation 3 procedures are worked through, no final view can be come to;
- potentially, hear essentially the same case again on a further application after Variation 3 is finalised.

Alternatively, an outcome might be that the Court would find that as the Proposed Plan presently stands a s85 case cannot be made out. Variation 3 would then be finalised, and the applicants could make a further s85 application, arguing that its effects are different from the Proposed Plan as it presently stands.

[14] The unresolved reference appeal RMA 0674/02 adds yet further permutations to the possible outcomes. All of that leads me to the very clear conclusion that to hear these inextricably inter-related matters in a piecemeal fashion is a wasteful use of the Court's time and resources, as well as those of the parties. It may be that the applicants are prepared to take that risk, but the Councils are not, and I agree with their stance.

Direction

[15] There will therefore be a direction that this application is to be listed for hearing with RMA 0674/02 and any reference appeals arising out of the City Council's hearings of submissions on Variation 3 of the Proposed Plan. The applicants have leave to seek a review of this direction if the Council's decisions on Variation 3 have not been released by 29 April 2005.

Costs

[16] Costs are reserved.

DATED at Wellington this 15th day of February 2005

C J Thompson
Environment Judge