IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-470-456

	IN THE MATTER OF	the Resource Management Act 1991
	BETWEEN	ROBERT STANLEY POWER AND THE STERLING TRUST Appellant
	AND	WHAKATANE DISTRICT COUNCIL First Respondent
	AND	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC Second Respondent
	AND	OHIWA HARBOUR MARGINS SOCIETY INC Third Respondent
	AND	TE RUNANGA O NGATI AWA Fourth Respondent

Hearing: 2 and 3 June 2009

Appearances: M J E Williams for appellants
N D Wright for first respondent
S Ryan for second and third respondents
J P Koning for fourth respondent

Judgment: 30 October 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 11 am on Friday 30 October 2009

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[1] This is an appeal from a decision of the Environment Court given on 14 May 2008. The appellants, Mr Power and the Sterling Trust, are the owners of a site at 1B Muriwai Drive, Whakatane, widely known as the Reef. It is situated near the Whakatane river mouth and harbour entrance.

[2] The principal issue in the Environment Court was the extent and nature of building height controls for the Reef site. The present appellants sought a more liberal planning regime for height and building intensity. Other parties, including the Royal Forest and Bird Protection Society, sought tighter restrictions than those imposed by the Council. There were concerns about the sensitive nature of the Reef site's surroundings and the impact of relaxed controls on natural landscape and cultural values. Te Runanga o Ngati Awa, a s 274 intervening party, expressed particular concern about the effect of a more relaxed planning regime on the nearby Wairaka marae and on cultural values generally.

[3] The disputed issues came before the Environment Court in the context of an appeal in respect of the District Plan rule framework under Variation 2 to the proposed Whakatane District Plan. In the course of its decision, the Environment Court considered a variety of planning factors. They included cultural issues, aspects of the landscape and natural hazards, amenity values, economic considerations and the height, scale and bulk of buildings.

[4] Having conducted an analysis under s 32 of the Resource Management Act 1991 (the Act), the Environment Court concluded that there was no reason to interfere with zoning decisions made by the Council, nor to change the Outstanding Natural Feature and Landscape (ONFL) boundaries of the Reef site.

[5] However, in relation to maximum building heights controlled by means of prescribed rolling height assessments, the Environment Court imposed a more restrictive regime than that appearing in Variation 2. At [126] of its decision the

Environment Court prescribed the following controls over maximum building height:

> [126] **The maximum building height:**
>
> (a) within eight metres of the frontage of the site the maximum height plane is to be six metres as a permitted activity and nine metres as a discretionary activity;
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> (b) beyond eight metres of the frontage the maximum building height plane is to be nine metres as a permitted activity;
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> (c) beyond eight metres of frontage the maximum building height plane as a discretionary activity is to be 12 metres;
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> (d) any building outside the identified maximum heights is a non-complying activity.

[6] During the course of the hearing in the Environment Court, the Council developed a further proposal which was the subject of discussion between the Court and counsel, but not formally tendered in evidence. In its decision of 14 May 2008, the Environment Court ruled that it lacked jurisdiction to entertain the proposal (the Alternative).

[7] In this Court, Mr Williams' primary argument for the appellants is that the Environment Court was wrong to decline jurisdiction. He seeks an order remitting the appeal to the Environment Court for reconsideration of the Alternative. Several subsidiary points are also taken. It is argued that:

a) The Environment Court wrongly failed to consider invoking its jurisdiction under s 293 of the Act in its pre (2003) amendment form.

b) The Court misdirected itself in respect of efficiency issues, failing to apply the correct legal test under s 85 or to undertake adequately the analysis required by s 32.

c) The Court incorrectly recorded the agreed position of all parties in respect of the appropriate height limit at the road frontage and for the area extending back eight metres from that frontage.

d) The Court erred in maintaining both the business zone boundary and the boundary of the (ONFL) affecting the Reef site at the RL20 metre contour having regard to the need to construct a debris fence. During oral argument, Mr Williams indicated that this point was not to be pursued unless the appellants succeeded on their principal argument.

[8] It is necessary to say something about the stance adopted by the first respondent Council. The Alternative had been developed by the Council in consultation with the appellants. It was supported and indeed, promoted, by the Council in the latter stage of the hearing in the Environment Court. But following the release of the Environment Court's decision, the Council has changed its position. In this Court it argues that the decision of the Environment Court was fair and reasonable, and in particular that the Court was right to conclude that it had no jurisdiction to consider the Alternative.

[9] Counsel for the Council argues that the concerns identified by the Environment Court about vires are of substance and moreover, that at a practical level, the adoption of the Alternative would lead to unacceptable uncertainty.

[10] In response to the appellant's submissions, the first respondent argues that the Court reached appropriate conclusions in assessing what constitutes efficient use of the site, and in finding that considerations of efficiency do not equate with economic viability; that the Court did not adopt the wrong legal test when applying the reasonable use criteria under s 85; that the six metre height limit at the building frontage was a simple error by the Court that should be corrected to read seven metres; and that, on the evidence available, the Court was entitled to reach its conclusions on building line restriction and zone boundary matters.

[11] The second and third respondents are respectively the Royal Forest and Bird Protection Society of NZ Inc, and Ohiwa Harbour Margins Society Inc. They generally support the Council's stance on this appeal, although as will be seen below they took different positions before the Environment Court.

[12] The fourth respondent, Te Runanga o Ngati Awa also supports the Council's position, but lays particular emphasis on the cultural significance of the Reef site.

This Court's appellate jurisdiction

[13] The principles governing appeals from the Environment Court to this Court are well established and are not in dispute. Section 299 of the Act provides that appeals to the High Court from the Environment Court lie in respect of a point of law only. A successful appellant must demonstrate that a material question of law has been erroneously decided by the Environment Court: *Smith v Takapuna City Council* (1988) 13 NZTPA 156. The applicable principles were summarised in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153 by the Full Court:

> We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
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> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
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> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
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> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[14] As was pointed out by Fisher J in *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 at 426, the Court must be vigilant in resisting attempts by litigants disappointed before the Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law.

Relevant Background

[15] The Environment Court decision commences with a useful summary of the physical setting within which the Reef site lies:

> [2] The *Reef Site* has an area of 9,101 m^2 with a 66 metre frontage. Much of the Reef Site includes the steep slopes of the escarpment behind. It lies at the end of a public road, Muriwai Drive, adjacent to a recently upgraded carpark and vehicle turnaround area and at the eastern end of a narrow strip of 22 developed properties at the foot of the Kohi Point headland and escarpment. An unformed track and vehicle turning area extends north, finishing where the flat land at the foot of the escarpment runs out. Across the road from the Reef Site is an open grassed space adjacent to the Whakatane River mouth and Bar.
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> [3] The Reef Site has a two storey building, on the relatively level platform at about RL5-6 metres, housing a restaurant. The site is spot zoned Business 1 below the RL20 metre contour on the escarpment and Rural above, with an Outstanding Natural Feature and Landscape (ONFL) on its upper slopes above RL30 metres up to RL100 metres, with the extent of both zone boundaries an issue in these appeals. Approximately one third of the site is currently zoned for business use.
>
> [4] The Reef Site has had a longstanding business use. Tea rooms were established in 1968 and later a restaurant. This use has been reflected in some form of Business zoning over several Plans. The rear of the site, including the land zoned Business 1, rises steeply up the escarpment.
>
> [5] The vegetation cover on the escarpment is relatively sparse with considerable areas of natural exposed rock, although there are signs of clearance. There are a small number of well-established pohutukawa higher up the slope but the rest of the vegetation is largely exotic.
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> [6] The Reef Site lies within the coastal environment at the junction of three significant natural landscape elements: the vegetated headland and associated escarpment of Kohi Point, Whakatane (Piripai) Spit and Whakatane River mouth. It is also within an area of cultural significance to tangata whenua, Ngati Awa. The land to the north and east is Scenic Reserve, owned and administered by the Council. It includes a two-storey coastguard building with mature pohutukawa behind it immediately to the north, the last building along Muriwai Drive (1C Muriwai Drive). The Whakatane District Council also owns the site to the south (1A Muriwai Drive). It is designated as Harbour Operation (Signal Station), has a Residential zoning, at issue in these appeals, and accommodates the Harbour Master's Signal Station.
>
> [7] The general area around the site is a low key but busy location used by people for fishing and general recreation, accessing the river and coastal edge. There is a river-front *Greenway* connecting The Heads to the Whakatane Town Centre, some distance away, and there is a new waka house on the route. Charter boat trips to White Island or for sea fishing, and recreational vessels pass through the River entrance and across the Bar close

to the Reef Site. There is a bronze figure of Wairaka on Turuturu Roimata, a rock at the mouth of the Whakatane River, with its name meaning *the shedding of tears* symbolizing the departure of the spirits.

[8] The residential development at the toe of the escarpment in the vicinity is predominantly one or two storey houses, although there are up to three storeys in places. One four storey residential apartment (the Schaeff property) is consented and under construction. The cadastral boundaries of 1A and 1B Muriwai Drive – the Signal Station and the Reef Site – extend further up the escarpment than the Residentially zoned land.

[16] The planning history of the site may be gleamed from the evidence of Mr J B Olliver, a planner engaged by the Whakatane District Council. In his evidence to the Environment Court he said:

10. 1B Muriwai Drive is an unusual site. It lies at the eastern end of the strip of developed land adjacent to Muriwai Drive comprising just 22 properties. It is 9101m^2 in area and extends from a relatively level platform at approximately 5m RL adjacent to Muriwai Drive up the steep escarpment to a height of approximately 100m RL.

11. A tearoom was built on the site around 1968 and this subsequently became the Reef Restaurant which was extended in 1982. The restaurant has operated more or less continuously on the site since 1968.

12. The land to the north and east of the site is a Scenic Reserve owned and administered by the Council. It includes a two-storeyed coastguard building lying immediately to the north of 1B Muriwai Drive. To the south is a site also owned by the Council and accommodating the Harbour Masters Signal Station. This building is residential in appearance and scale.

13. The front generally flat portion of 1B Muriwai Drive was zoned Commercial F under the Operative District Plan, which became operative in 1990. The rear portion of the site, incorporating the steeper escarpment was designated as Scenic Reserve with an underlying zoning of Harbour A.

14. In 1999 the Council publicly-notified Plan Change 50, which applied to Business zones in the District. That plan change rationalised all the commercial zonings and simplified the zone provisions. That plan change also rezoned the front part of the site Business 1. Because Plan Change 50 only dealt with Commercial/Business zones the rear portion of the site retained its Scenic Reserve designation and Harbour A underlying zoning from the Operative Plan. Plan Change 50 proceeded through the statutory processes of submissions, decisions and appeals to the point where the zoning of 1B Muriwai Drive was beyond challenge and able to be relied on.

15. Variation 2, notified in February 2003, retained the Business 1 zoning on the front part of the site, but introduced some different

> development standards and criteria. Variation 2 also changed the zoning of the rear part of the site to Rural 3, removed the Scenic Reserve designation from the site and scheduled an Outstanding Natural Feature and Landscape (numbered L5 in Schedule 5.3) on the Rural 3 part of the site. Variation 2 is now effectively merged into the Proposed District Plan and it is appeals on the Proposed District Plan that are the subject of this evidence.
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> …
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> 42. As I have outlined, this site has had a lengthy planning history of commercial zoning and development. It has had a 'spot' commercial zoning for many years. The height rules and associated development criteria have reflected that. Under the original Commercial F zoning in the Operative Plan the maximum permitted height was nominally 8m but this height could be exceeded where the building was contained within 45^{o} height planes directed above the site from points 8m above the boundaries. The rules also provided for a 'dispensation' without notice to exceed the height standard, with no absolute limit on the extent of dispensation.
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> 43. Plan Change 50 introduced new height standards for the Business 1 zoned part of the site. The maximum permitted height was 10m and the maximum restricted discretionary height was 15m. Above 15m height was a discretionary activity, with no specified limit. These height standards were the subject of submissions and Council decisions but were not appealed and they reached the stage where they were beyond challenge and able to be administered as if they were operative in accordance with s 19 of the RMA.
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> 44. In my opinion the Variation 2 rules represent a reduction in scope for tall buildings on the site compared to the previous planning regime by introducing a maximum discretionary height of 18m. The previous planning regimes did not specify a maximum height in a way that would lead to an application being considered as a non-complying activity.

[17] The key issue before the Environment Court was that of the maximum building height restriction. The various maximum height contentions advanced by the parties were discussed by the Court in the context of the rolling height method included in the District Plan. That method allows a building to climb up the escarpment and also by excavation (subject to any other necessary consents) to extend below natural ground level. It also allows for projections of various sorts beyond the maximum permitted height, provided that certain restrictions are not infringed.

[18] Before the Environment Court, the present appellants supported the outcome of Variation 2 and so aligned their position with that of the Council. Variation 2

provided for a maximum building height of 12 metres as a permitted activity, with a further three metres as a controlled activity and an additional three metres beyond that as a discretionary activity.

[19] The second and third respondents respectively advocated a permitted maximum height of six to seven metres, extended to nine to ten metres as a discretionary activity. The fourth respondent supported a maximum height of nine metres from finished ground level as a permitted activity; everything above that would be non-complying.

[20] To place these contentions in proper perspective, a maximum height plane of 18 metres for a discretionary activity in the council's Variation 2 decision would allow an eight-storey building to step up the escarpment, extending to RL29 metres.

[21] The contentions of the second, third and fourth respondents were driven by separate but related concerns. The second and third respondents are constituted *inter alia* for the purpose of ensuring that amenity values are accorded due weight in appropriate cases. The fourth respondent has a particular interest in the Reef site which is, as is accepted by all parties, located within an area of great cultural and historical significance to Ngati Awa.

[22] As part of the proceedings before the Environment Court, the Sterling Trust sought a number of changes designed to expand the building envelope which would authorise building out to the edges of the Reef Site as well as upwards on the steep slope. The changes sought would have involved the reduction of side and rear yards and natural light requirements, and the relocation of the Business 1 zoning and ONFL boundary lines from the 20 metre to the 30 metre contour. Issues relating to side and rear yards and natural light requirements do not arise in this Court. Realignment of boundaries is referred to briefly later in this judgment.

[23] During the Environment Court hearing an alternative planning technique (the Alternative) arose for discussion in the context of argument over height control. It was the subject of discussion between members of the Court and counsel on one or two occasions during the hearing, but was not referred to in evidence nor in formal

submissions. Literally at the very last moment of the hearing, Mr Wright for the Council produced the Alternative, which was briefly discussed in open Court and then simply retained by members of the Court for consideration after the hearing had concluded.

[24] In its decision, the Environment Court recorded receipt of the Alternative in the following way:

> [48] At the conclusion of the hearing Mr Wright for the District Council put forward a possible new approach, but without making any submissions on whether it would be within our jurisdiction on the appeals. We summarise it here:
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> - permitted envelope – street frontage maximum height plane of seven metres extending a minimum eight metres into the site, permitted nine metre maximum height plane for the remainder of the site, up to an elevation of RL29 metres;
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> - controlled or discretionary envelope – in middle of site within the 15 metre maximum height plane up to an elevation of RL29 metres. Discretionary framework/envelope if no approved outline development plan. Controlled if approved outline development plan in place. Outline development plan to be referenced into plan rules, with a requirement any such plan must be produced in consultation with Te Runanga O Ngati Awa, Ohiwa Harbour Margins Society Incorporated and Royal Forest and Bird Society of New Zealand Ltd;
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> - softening of sunlighting rules, with details to be worked out;
>
> - shift zone and ONFL to 30 metres, with a debris fence controlled activity.

[25] The Court decided that it lacked jurisdiction to entertain the Alternative because it involved adopting a new control over the operative rolling height method. The Court said:

> [106] The Council suggested in closing bringing down the maximum discretionary height plane to 15 metres and effectively abandoning the 12-15 metre height plane controlled activity status unless there was an agreed outline development plan. They also suggest that any building above RL29 metres should be a non-complying activity. We set aside that approach as outside our jurisdiction as it involves adopting a new control over the rolling height method. We received no submissions from any one party on our jurisdiction to go down that route. Not everyone with an interest in a new control is a party to the hearing or could be involved in the process of preparing and agreeing an outline development plan for our consideration.

[26] The principal argument advanced for the appellants on the present appeal is that the Environment Court was wrong to decline jurisdiction. Mr Williams submits that the Court could and should have accepted jurisdiction and that furthermore it ought to have proceeded to settle the terms of the Alternative itself.

The jurisdiction issue

[27] The parties are agreed that the Environment Court was correct to apply the provisions of the Act as they existed prior to 1 August 2003, that is prior to the enactment of the 2003 Amendment Act. Clause 14 of the First Schedule to the Act as it formerly existed read:

> (1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court –
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> (a) Any provision included in the proposed policy statement of plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or
>
> (b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan, -
>
> if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan.
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> …
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> (4) Any reference to the Environment Court under this clause shall be lodged with the Environment Court within 15 working days of service of the decision of the Local Authority under clause 11 or the service of the decision of a requiring authority or heritage protection authority under clause 13, and shall state -
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> (a) The reasons for the reference and relief sought; and
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> (b) The address for service of the person who made the reference; and
>
> (c) Any other matters required by regulations. Form 4 to the Resource Management Forms Regulations 1991 prescribes the form for a reference to the Environment Court under clause 14 of the First Schedule to the Act. Form 4 makes provision for the relief sought to be specified.

[28] The extent to which the jurisdiction of the Environment Court is circumscribed by the relief sought in a clause 14 reference has been the subject of

discussion in a number of earlier authorities. In *Leith v Auckland City Council* [1995] NZRMA 400 the Planning Tribunal said at 411:

> The following propositions from the decisions cited were formulated by reference to appeals about the contents of district schemes under the former Town and Country Planning Acts. However the Tribunal's function on appeals under cl 14 of the First Schedule to the Resource Management Act is essentially the same as the function it had on those appeals under the former legislation. We consider that the following propositions remain applicable to references under the Resource Management Act. The Tribunal is not itself a planning authority with executive functions of identifying and evaluating specific provisions for a planning instrument (*Waimea Residents Association v Chelsea Investments* (High Court, Wellington, M 616/81, 16 December 1981, Davison CJ). It is imperative to spell out specifically in the reference the relief sought, so that the evidence and the Tribunal's attention can be focused on the scope of the inquiry (*Fletcher Forests Ltd v Taumarunui County Council* (1983) 11 NZTPA 233). It is not for the Tribunal to unravel what the appellants seek (*Fisher v Taupo County Council*); and appellants need to come prepared to make a positive contribution by specifying what they claim should be in the planning instrument in place of that which is challenged (*McCrary v Great Barrier Island County Council* (Decision A 50/87)).

[29] In *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 166 the Full Court of the High Court said:

> 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. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

[30] The test in the *Countdown Properties* case has been widely accepted: see for example *Re an Application by Vivid Holdings Ltd* [1999] NZRMA 468 in the Environment Court and *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 in this Court. But care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the reference are not subverted by an unduly narrow approach. That was emphasised by Fisher J in *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 at 574-595, where it was said:

> [73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.
>
> [74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in ss 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would *not* have been within the reasonable contemplation of those who saw the scope of the original reference.

[31] More recently again, Wylie J counselled against an unduly formalistic approach in *General Distributors Ltd v Waipa District Council* HC AK CIV 2008-404-4857, 19 December 2008, where at [55] he said:

> [55] One of the underlying purposes of the notification/ submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness.
>
> [56] There is of course a practical difficulty. As was noted in *Countdown Properties* at 165, councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.

[32] Ultimately, as Panckhurst J observed in *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 at 413:

> … 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.

That approach requires scrutiny of the relief sought in the relevant reference: *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [31].

[33] The parties' submissions to the Council are not among the documents before the Court, but it is common ground that the proposal developed by the Council

during the Environment Court hearing was not, unsurprisingly, referred to at Council level. Neither does it appear in the references to the Environment Court. Nor, of course, was it the subject of evidence by the various witnesses, including numerous expert witnesses who gave evidence before that Court.

[34] The Alternative was not in fact presented to the Environment Court until the very last moments of the hearing in that Court, although it had been the subject of earlier discussion between members of the Court and counsel and one or more draft outlines had been considered.

[35] The appellant's reference sought to maintain the building height regime established by Variation 2, namely a permitted height limit fixed at 12 metres, with a further three metres as a controlled activity and an additional three metres again as a discretionary activity. In contrast, the Alternative provided for:

a) a maximum permitted height at street frontage of seven metres with a permitted nine metre height for the remainder of the site;

b) a controlled or discretionary envelope of up to 15m in the middle of the site, development above the permitted level to be a controlled activity if the subject of an approved outline development plan but otherwise a discretionary activity.

[36] The Alternative is not formally before the Court and, of course, has not yet been finally settled. Nevertheless, there is no doubt that it involves an important new ingredient, namely a provision for an outline development plan to be advanced in consultation with the parties to the present appeal. The Court considered that it had no jurisdiction to entertain the Alternative, although it did engage in discussions about its substance at one or two points during the hearing.

[37] The Environment Court's concern was that the development plan constituted a new method of establishing controls over height. In other words, it departed from the rolling height method which hitherto been employed widely (if not universally) throughout the Council's area. So the Alternative was of significance well beyond

the site itself. On that ground alone it presents obvious jurisdictional difficulties. But viewed in terms of the Reef site alone, the Alternative still runs foul of the procedural restrictions attending references to the Environment Court.

[38] All parties acknowledge that the site is iconic and it follows that there could well be a measure of interest in the Alternative beyond the situation of the parties before the Environment Court. Such persons could be expected to include some of the residents who occupy the properties in Muriwai Drive, as they would undoubtedly be affected by the newly developed proposals.

[39] The proposal contained in the Alternative would not have been in the reasonable contemplation of those who saw the scope of the submissions before the Council, or indeed, the scope of the references before the Environment Court.

[40] Mr Williams, for the appellants, submits that the Alternative simply involves an alternative technique of achieving much the same ultimate outcome as contemplated by the references. In other words, he contends that it naturally falls within the references.

[41] I am unable to accept that submission. The Environment Court was not prepared to uphold the Council's decision to fix a 15 metre height limit on a controlled activity basis. The Alternative provided for a controlled activity envelope, if preceded by an approved outline development plan. That plan was to be "…referenced into plan rules, with a requirement that any such plan must be produced in consultation with Te Runanaga O Ngati Awa, Ohiwa Harbour Margins Society Inc and Royal Forest and Bird Protection Society of New Zealand Inc". The Environment Court considered that the proposal for a wider controlled activity envelope, provided an outline development plan had been approved by certain named participants, gave rise to issues affecting those who were not before the Court. I am satisfied that the Court was justified in reaching that conclusion, having regard to the importance of this particular site and to the wider implications of the proposal beyond the site itself. The Court said at [106] that:

> Not everyone with an interest in a new control is a party to the hearing or could be involved in the process of preparing and agreeing an outline

development plan for our consideration.

[42] In my view, the Court was articulating two separate concerns. The first related to the introduction of a new control (the development plan) as a technique for dealing with rolling height issues. The second concern related to giving a wider range of parties the opportunity to present submissions on the particular outline development plan for the Reef site presented for the Court's consideration.

[43] In the end, the jurisdiction issue comes down to a question of degree and, perhaps, even of impression. Here the provision for a defined envelope to enjoy controlled activity status, provided that a development plan has been agreed between a confined identified group, represents a planning technique not identified in the submissions before the Council, nor in the references to the Environment Court. Persons not before that Court may have wished to address a proposal which effectively placed the activity status of a proposal falling within the defined envelope in the hands of the second, third and fourth respondents.

[44] For these reasons I consider the Environment Court to have been right in determining that it lacked jurisdiction to consider the Alternative.

[45] There is a further potential difficulty with the Alternative, although given my primary conclusion it is unnecessary to explore this second issue beyond simply recording it. It is settled law that a Council may not reserve, by express subjective formulation, the right to decide whether or not a use comes within the category of permitted use: *McLeod Holdings Ltd v Countdown Properties Ltd* [1990] 14 NZTPA 362 at 372. It is arguable also that a rule which provides that an activity is a controlled activity only if it has been the subject of an approved outline plan is similarly invalid. That was the view expressed by Judge Sheppard in *Fletcher Development and Construction Ltd v Auckland City Council* [1990] 14 NZTPA 193. As Mr Ryan submits, a member of the public would have no way of ascertaining at any given point of time whether a particular development on the subject site would be a controlled activity or a discretionary one. That would have to await the settlement (or not as the case may be) of a development plan in consultation with the stipulated parties.

[46] It is, however, unnecessary to discuss the issue further. It is not essential to the outcome of the appeal and it was not a factor in the decision of the Environment Court to decline jurisdiction.

[47] Mr Williams submits that a breach of natural justice arises by reason of the failure of the Environment Court to advise counsel before issuing its judgment that it had jurisdictional concerns regarding the Alternative. He says that any such breach must necessarily amount to an error of law for the purposes of s 299 of the Act. I do not accept that a breach of natural justice occurred here. The Alternative was developed as the hearing proceeded, and was tendered to the Court at the conclusion of the hearing. A review of the transcript of the proceedings indicates that the members of the Court simply accepted the Alternative on the basis that they would give it such consideration following conclusion of the hearing as they saw fit.

[48] In my view the Court was not obliged, in the unusual circumstances of the case, to seek submissions on the jurisdiction point before it released its decision. But even if I am wrong in that and there was a breach of natural justice, any breach has been cured by the opportunity now afforded the parties on the hearing of the present appeal, to address the jurisdictional question.

Section 293

[49] Mr Williams mounted an alternative argument to the effect that the Environment Court ought to have turned its mind to the provisions of s 293 of the Act, and to have considered whether or not to exercise its powers to direct the giving of notice to interested parties. He argues that the Court's failure to consider its s 293 powers amounts to an error of law, and that this Court ought to remit the proceeding back to the Environment Court with a direction that it consider exercising its s 293 powers.

[50] In its pre-2003 Amendment Act form, s 293 provided:

> **293 Environment Court may order change to proposed policy statements and plans**

> (1) On the hearing an appeal against, or an inquiry into, the provisions of any proposed 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 Environment 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 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 Environment 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.

[51] This section was the subject of extensive consideration by Chisholm J in *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508. There, at [45] His Honour said:

> Before the Court has jurisdiction to invoke the section it must consider, first, that a reasonable case has been presented and, secondly, that some opportunity should be given to interested parties to consider the proposed change or revocation. But even if those requirements are satisfied the Court does not have an unlimited ability to pursue what it considers to be the best option for achieving the sustainable management purpose of the Act. By virtue of cl 15(2) of the First Schedule the Court is discharging an appellate function. The Environment Court has frequently reminded itself that it is not a planning authority: see for example Leith v Auckland City Council [1995] NZRMA 400; *Kaitiaki Tarawera Inc v Rotorua District Council*; *Hardie v Waitakere City Council* (Environment Court, Auckland A 69/00,7 June 2000, Judge Whiting); and *Haka International NZ Ltd v Rodney District Council* (Environment Court, Auckland A 109/01, 19 October 2002, Judge Newhook). Thus I agree with Mr McCoy that the Environment Court is not entitled to discard its appellate role and take on the planning role Parliament has seen fit to vest in territorial authorities. As mentioned in Kaitiaki this may come down to matters of significance and degree.

[52] Counsel were agreed that the discretion to exercise the Court's s 293 powers must be used cautiously and sparingly, and that questions of scale and complexity are highly relevant: *Apple Fields* at [58].

[53] It is relevant to observe that s 293 confers on the Court a discretionary jurisdiction. The Court's powers are permissive in character. Generally an omission or failure to exercise a permissive power will not amount to an error of law unless a failure to exercise the power would be contrary to the policy of the empowering enactment: *Padfield v Minister of Agriculture, Fisheries and Foods* [1968] AC 997.

[54] Mr Williams accepts that there is limited scope for review of the exercise of a discretionary power such as is conferred by s 293, but submits it will be an error of law if the Court has simply failed to consider whether or not it should exercise its s 293 jurisdiction. As to that, the first point to be made is that it is by no means certain that the Court has failed to consider exercising its jurisdiction, although I accept that there is no reference in the decision under appeal to that section.

[55] The second point is that even if there is substance in Mr Williams' contention, there is little utility in referring the proceeding back to the Environment Court for s 293 consideration, if the case to be made for a direction under s 293 is weak. In that regard, this Court is just as well placed as is the Environment Court to determine the strength of the argument for the invocation of the section.

[56] As is observed by Chisholm J in *Apple Fields* the Environment Court has an appellate jurisdiction, and does not undertake the planning role which Parliament has seen fit to vest in territorial authorities. The significance and scope of the issues under consideration will be of major importance.

[57] Before invoking s 293, the Environment Court would need to be satisfied that a "reasonable case" existed: s 293(1). In *Apple Fields* at [50] Chisholm J construed that requirement as reflecting the fact that:

> … further public notification and reopening of submissions is a serious step potentially involving considerable time and expense which should only be contemplated where the case in support of changing or revoking the relevant provision is of sufficient strength to justify that step. Put another way, the case should be strong enough to have a reasonable prospect of success in the event that the Court decides to utilise the powers conferred by s 293.

[58] The difficulty here for the appellant lies in the likely precedent effect of what is proposed in the Alternative. The requirement in the Alternative for consultation

with named parties, and the provision for a development plan which may have an impact on activity status, reflects a radically different approach to the first respondent's administration of height limits.

[59] Mr Williams submits that the Alternative is site specific and will have no precedent effect. Other counsel argue that the case would inevitably serve as a precedent within the first respondent's area. I agree. It is a proper inference also that the Environment Court was troubled also about the precedent effect of the Alternative. At [119] of its decision, while noting that there were features of the proposal that may have the potential to provide a better regime, the Court observed that there could be an advantage in the Council taking a further look at the implications of the rolling height approach for the Plan, in the context of the Business 1 zone. The inference I draw is that the Court believed that although a fresh approach to the rolling height method might be warranted, that was essentially a matter for the Council as the planning authority, not for the Environment Court.

[60] That Court was entitled, in my view, to determine that it was for the Council to revisit issues raised by the Alternative, and not for the Environment Court. Had that Court actually considered the provisions of s 293, it would have concluded that the appellant had not made out a "reasonable case" for the invocation of the section.

[61] In summary therefore, I conclude that:

a) The fact that the Environment Court has not in its decision expressly referred to s 293 does not necessarily imply that the Court did not consider it at all, but even if the section had received no such consideration, the omission to do so would not amount to an error of law, having regard to the essentially permissive character of the jurisdiction conferred;

b) It may properly be inferred that the Environment Court considered that the appropriate course was for the Council to revisit the question of the rolling height controls in the context of its Plan.

Efficiency considerations

[62] Evidence was given on behalf of the appellants by Mr Michael Jensen, an experienced valuer. He gave evidence of the financial implications of two theoretical alternative developments of the site. The first, known as the Mirador Option, is already the subject of a consent and is now under appeal. The second, known as the Prolapse Option, was similar but marginally smaller. The Mirador Option is likely to produce higher financial returns largely because it incorporates a significant penthouse unit on the eighth floor. Mr Jensen concluded that the Mirador proposal was the only suitable option in terms of the efficient use of the land in light of considerations of economic viability. But the Court noted that he did not consider other options for the development of the site and, therefore, considered his assessment to be of limited usefulness. The Court concluded that:

> [79] There is more to economic efficiency and efficient use and development than maximising the floor area. We had no evidence in front of us on options for the site other than two eight storey apartment developments. We consider the innovation in design card was rather overplayed. We do not accept that there could not be innovation in design and a higher standard of design and development within a lower building height maximum.

[63] Mr Jensen's evidence and conclusions were effectively unchallenged.

[64] Mr Williams submits that the Court was not entitled to reject Mr Jensen's evidence. For one thing, he had evaluated an option proposed by the second respondent. More broadly, however, Mr Williams submits that the Environment Court was bound to give reasons for rejecting unchallenged expert evidence. For that proposition he relies upon the comments of Asher J in *The Friends of Pakiri Beach v Auckland Regional Council* HC AK CIV 2006-404-3544, 26 March 2009. There, His Honour held that it was an error of law for a deciding body to fail to draw from unchallenged primary facts an inference in favour of a party when there was no reasonably feasible alternative.

[65] Other counsel submit that efficiency and economic viability are not necessarily the same thing. There was no suggestion in this case that no reasonable economic use could be made of the site in terms of s 85 of the Act. Mr Williams,

however, submitted to the Environment Court that the economic well-being of the appellants was a matter requiring that Court's consideration.

[66] There is no doubt that economic efficiency and well-being is a factor in the definition of sustainable management and that economic considerations generally will be relevant. But as was said in *NZ Rail v Marlborough District Council* [1994] NZRMA 70 at 88:

> It is the broader aspects of economics rather than narrower considerations of financial viability for an individual developer which will be relevant.

[67] Mr Williams' primary concern appears to have been the Court's reference to s 85 of the Act, under which the Court has power to direct a local authority to change a rule in a plan if that rule renders land incapable of reasonable use. But the Court was simply discounting that option in the present case, because there was no evidence that this site was incapable of reasonable use. It did not regard Mr Jensen's evidence as necessarily leading to that conclusion. In reaching its decision on the point, the Court was entitled to draw on its own expertise. Once the Court was satisfied that the land was capable of some reasonable use, the weight to be accorded the owner's reasonable expectations needed to be balanced against environmental, social and cultural issues. These were matters within the province of the Environment Court.

[68] Mr Williams submits that this was a case in which s 85 was engaged. However, the Environment Court was entitled to expect much more detailed and compelling evidence on that point than was adduced by the appellants. Accordingly, I reject Mr Williams' submission that the Court made an error of law in not uncritically accepting Mr Jensen's evidence. I reject also the proposition that the Court was not entitled to conclude, as it did at [79], that "there is more to economic efficiency and efficient use and development than maximising the floor area".

Six metre height limit at building frontage

[69] As part of its decision the Environment Court imposed a six metre height limit extending back eight metres from the front of the site in order to mitigate the

effects of the "high intensity building development" in the absence of any front yard. In reaching that decision, the Court drew on the evidence of various landscape witnesses in respect of the treatment of the frontage of the site. The consensus of expert opinion before the Court was that it would be desirable to have a two-storey building at the road frontage with any height increase beyond that set back from the frontage.

[70] The Court accepted that a six metre height limit at the road frontage may be too restrictive for a two-storey commercial development. Indeed, a Caucus Statement filed by the landscape architects on an agreed basis referred to a two-storey building frontage to the street. It is agreed among the parties that a seven metre height restriction at the street frontage was appropriate as, indeed, was envisaged by the conclusion of the Environment Court hearing. The parties are agreed that the decision of the Environment Court ought to be varied by substituting a seven metre height limit at the street frontage for the six metre restriction imposed by the Environment Court. I am satisfied that this substitution should be made.

Building line restriction

[71] The final issue on appeal relates to the Environment Court's determination that the Business 1 zone boundaries should be maintained at the RL20 metre contour. Mr Williams explained in oral argument that this argument was to be pursued only if the principal argument as to jurisdiction succeeded. The appellants wished to avoid the possibility that a development of their site which might otherwise constitute a controlled activity might, nevertheless, become discretionary by reason of building line restriction issues.

[72] The appellants having failed on their principal argument, there is accordingly no need for the Court to consider further this final aspect of their appeal.

Result

[73] The appeal succeeds to the extent that the decision of the Environment Court

is varied by substituting in [126](a) of the decision the expression, “seven metres” in lieu of the expression, “six metres” where it appears therein.

[74] The appeal is otherwise dismissed.

[75] Costs are reserved. Counsel may file memoranda if they are unable to agree.

C J Allan J