IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-004857

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	an appeal under s 299
BETWEEN	GENERAL DISTRIBUTORS LIMITED Appellant
AND	WAIPA DISTRICT COUNCIL Respondent
AND	THE NATIONAL TRADING COMPANY OF NEW ZEALAND LIMITED First Section 301 Party
AND	BILIMAG HOLDINGS LIMITED Second Section 301 Party

Hearing: 21 and 22 October 2008

Appearances: C N Whata and J D Gardner-Hopkins for the Appellant
P M Lang for the Respondent
D R Clay and V N Morrison for the First Section 301 Party
L F Muldowney for the Second Section 301 Party

Judgment: 19 December 2008

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie on 19 December 2008 at 11.00am
pursuant to r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

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[1] This is an appeal from a decision of the Environment Court in relation to a proposed plan change – Plan Change 53 – to the Operative Waipa District Plan ("the District Plan"). It raises essentially two issues:

a) whether the Environment Court had jurisdiction to amend the District Plan in a way which was not sought in the plan change as notified, and which was not expressly sought by any submitter or further submitter; and

b) whether the way in which the Environment Court approached the prohibition contained in s 74(3) of the Resource Management Act 1991 ("the Act") subverts unchallenged objectives and policies contained in the District Plan.

Relevant factual background

[2] Plan Change 53 is a privately initiated plan change. It was initiated by Bilimag Holdings Limited ("Bilimag"). It seeks to rezone an area of 6.08 ha situated at 670 Cambridge Road, Te Awamutu from residential and rural zoning to general zoning. It also seeks a number of changes to existing objectives, policies and rules contained in the District Plan.

[3] The overall purpose of the plan change is to provide for a large format retail development (including a supermarket) on the subject site, which is situated approximately 1.2 kms from the Te Awamutu town centre.

[4] Bilimag requested the Waipa District Council ("the Council") to undertake the change to its District Plan pursuant to cl 21(1) in the First Schedule to the Act. It lodged a draft plan change together with an evaluation made under s 32 of the Act.

[5] The Council did not adopt the plan change under cl 25(2)(a). Rather it accepted the request and proceeded to notify it under cl 25(2)(b) of the Act.

[6] Bilimag did not lodge a submission. It was of course nevertheless entitled to appear at the hearing before the Council – cl 29(3) of the First Schedule to the Act.

[7] Various submissions were lodged, including a submission by The National Trading Company of New Zealand Limited ("NTC"). NTC is a wholly-owned subsidiary of Foodstuffs (Auckland) Limited ("Foodstuffs"). Foodstuffs trades under various banners including Pak'N Save, New World and Four Square. It is the proposed tenant of the supermarket space which would be enabled by the plan change. NTC, in its submission supported the change, claiming that it is consistent with the purpose and principles of the Act, that it will benefit the economic and social well-being of the Te Awamutu community and that any adverse effects are mitigated through conditions and the proposed rules. No changes to the wording of the plan change were sought.

[8] A submission was also lodged by the appellant – General Distributors Limited ("GDL"). GDL is a subsidiary of Progressive Enterprises Limited ("Progressive"). Progressive also trades under various banners including Countdown, Woolworths and Fresh Choice. It owns and operates one of the two existing supermarkets in Te Awamutu, which trades under the Woolworths banner. The other supermarket trades under the Fresh Choice banner. It is independently operated but is supplied by Progressive. GDL's submissions asserted that the plan change will not promote sustainable management, that it will not promote the centre based planning framework contained in the District Plan and it will undermine the District Plan's integrity and coherence.

[9] Thus the scene was set for yet another supermarket tussle without which planning and resource management law in this country would be so much the poorer.

[10] Round one was before the Council through its Regulatory Committee ("the Committee"). It held a hearing and issued its decision on 19 December 2006. The Committee recorded in its decision that it heard a substantial amount of technical and expert evidence, particularly in relation to economic effects on the Te Awamutu town centre. Substantial submissions were presented by both NTC and GDL. In the event the Committee was satisfied that the proposed plan change would promote the

sustainable management of natural and physical resources, and that it was in accordance with the purpose of the Act. It concluded that its effects would be minor, and in particular that the recognition and protection of the town centre afforded by the Plan would not be compromised by adoption of the plan change. The Council through the Committee resolved that the plan change should be approved, with some relatively minor modifications.

[11] Round two was before the Environment Court. Bilimag, NTC and GDL all appealed. There were two s 274 parties – Thornbury Properties Limited and Transit New Zealand. Bilimag sought minor changes to some aspects of the plan change approved by the Council. NTC also sought changes to the plan change. GDL, supported by Thornbury Properties Limited, sought that the Council's decision be overturned and that the proposed plan change be declined.

[12] In the event the appeals by Bilimag and NTC were settled by consent with the Council, and on the first day of the hearing consent documentation was filed. An amended version of the plan change incorporating the amendments made by the Council in its decision and further agreed changes was also filed. GDL did not consent and it submitted that the Environment Court had no jurisdiction to approve some of the changes the other parties had agreed.

[13] GDL's appeal proceeded to a hearing. It was heard over a period of some 20 days, spread over five separate periods, commencing in November 2007 and concluding in February 2008. The Environment Court issued its decision on 8 June 2008. Subject to one minor change, it approved the plan change in the form agreed by Bilimag, NTC and the Council. It considered that any effects on the Te Awamutu town centre will be no more than minor. It dismissed GDL's appeal.

[14] GDL has appealed to this Court and round three has been heard by me. GDL's appeal raises five points of law – four of which are interrelated. NTC and Bilimag appear having given notice under s 301 of the Act.

[15] I will outline the relevant details of the District Plan and the proposed plan change before turning to the points raised on appeal.

The District Plan

[16] The District Plan became operative on 1 December 1997. It uses zoning to identify areas within the district suitable for various groups of activities, and then sets performance standards and assessment criteria to control and manage the environmental effects of activities occurring within the zones.

[17] There are two substantial towns in the district – Cambridge and Te Awamutu. As the Environment Court noted at [8] of the decision under appeal, for commercial activities within these towns there are only two zones – namely the town centres zone and the general zone.

[18] In Te Awamutu, the town centres zone comprises seven blocks of land in the centre of the town. It is largely surrounded by the general zone, although there are isolated pockets of general zoning which are not immediately contiguous to the town centre zone. There are then industrial, residential and rural zones beyond the general zone.

[19] The zone statement for the town centres zone records that the zone contains concentrations of the most visitor and employee intensive activities such as retailing, personal services and offices. The broad strategy is to concentrate visitor-intensive activities – particularly retailing – in the defined central area, and to discourage the spread of visitor-intensive activities in the surrounding general and residential zones. Performance standards for the zone recognise the need to maintain a high standard of amenity for the large numbers of people working in and visiting the town centre.

[20] Relevant objectives and policies contained in the operative plan include the following:

a) *Objective C01*

> To sustainably manage the resources embodied in the central areas of the main towns in the District so that they efficiently meet community needs.

b) *Objective C03*

To ensure minimal adverse effects of commercial activities on other activities, on people, and on the wider environment.

c) *Objective C04*

To manage the development and redevelopment of the town centres in a way which enhances environmental quality and meets community outcomes.

d) *Policy C03*

To require the containment of visitor-intensive activities (particularly retailing) in defined 'core' areas (the Town Centres Zone) of Te Awamutu and Cambridge.

e) *Policy C04*

To allow a wide range of activities which benefit from central locations in the area around the retail 'core' ('General Zone') in Te Awamutu and Cambridge and Kihikihi town centre.

f) *Policy C06*

To encourage energy efficiency by allowing intensive development in town centre areas, and requiring concentration of visitor-intensive activities, particularly retailing.

The Plan Change

[21] As noted, the plan change seeks to rezone residential and rural zoned land in Cambridge Road to general zone.

[22] The executive summary in the public notice of the plan change stated as follows:

> The proposed changes to the objectives/policies for commercial activities relate to:
>
> - Recognising that there maybe circumstances where commercial activities could establish outside of town centres or surrounding general zone areas.
>
> - Providing for commercial activities outside of town centres where it (sic) can be demonstrated that any adverse effects on the environment of these activities will be no more than minor.
>
> - Altering the prescriptive wording of some policies to provide a more flexible approach to commercial activities outside of town centres.
>
> - Consequential amendments to policy explanations and the zone statements for the town centre and general zones.

[23] There are various references in the plan change document itself, and in the s 32 report accompanying it, to the effect that adopting the plan change will have a no more than minor effect on the environment in the Te Awamutu town centre.

[24] As notified, the plan change did not seek to amend objectives C01, C03 or C04. It did however seek to alter the explanation to objective C04. The proposed alterations were as follows:

> The broad strategy for sustainable management of the town centres in the district is to consolidate visitor-intensive activities (particularly retailing) in defined 'core' areas (Town Centres Zone) ~~surrounded~~**supported** by mixed activity areas occurring for the wide range of activities ~~which benefit from a central location~~ (General Zone) in any urban community.
>
> **It is recognised that there maybe circumstances (such as lack of availability of suitably sized land parcels) where it is not possible for proposed large scale commercial developments to be located in areas surrounding the defined 'core areas'. Council may consider the extension of the General Zone to locations that do not surround the Town Centres Zone.**

[25] The plan change as notified proposed a new objective C05 and accompanying explanation to read as follows:

> To provide for commercial activities outside the Town Centre zone where there are social and economic benefits for the community and where it can

> be demonstrated that any adverse effects on the environment of the town centre concerned will be no more than minor.
>
> **Explanation**
>
> While visitor-intensive activity is generally to be concentrated in the Town Centre zone there may be circumstances where other areas may be able to be developed for commercial/mixed use activities without impacting on the role or function of the town centre concerned. Council may consider the establishment of visitor intensive activities in areas removed from the Town Centre Zone (or surrounding General Zone) where it is demonstrated that such activities will have no more than minor adverse effects on the town centre concerned.

[26] There were amendments to policy C03 and a new policy C04A was proposed. The new policy and explanation was to read as follows:

> To provide for commercial/mixed use activities in areas of the District which do not form or surround existing town centres, to an extent that it can be demonstrated that such activities will not undermine the role and function of the town centres, as contained within the Town Centre Zone and the General Zone areas surrounding the town centres of Cambridge and Te Awamutu.
>
> **Explanation**
>
> While commercial activities are generally to be concentrated in the Town Centre Zone or the surrounding General Zone (policy C03, C012) there may be circumstances where other areas may be able to be developed for commercial/mixed use activities without impacting on the role or function of the town centre concerned. Council may consider the establishment of visitor intensive activities in areas removed from the Town Centre Zone (or surrounding General Zone) where it is demonstrated that such activities will have no more than minor adverse effects on a town centre concerned.

[27] There were other amendments and alterations proposed, including to the general zone statement, the town centres zone statement, and the rules.

The appeal

[28] The appeal is brought pursuant to s 299 of the Act. The right of appeal conferred by that section is limited to points of law.

[29] It is a trite observation that this Court should be slow to interfere with decisions of the Environment Court within its specialist area. To succeed GDL must identify a question of law arising out of the Environment Court's decision and then

demonstrate that that question of law has been erroneously decided by the Environment Court – *Smith v Takapuna CC* (1988) 13 NZTPA 156.

[30] The applicable principles were summarised in *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 153. In that case the full Court – Barker, Williamson and Fraser JJ – noted as follows:

> … this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal -
>
> (a) Applied a wrong legal test; or
>
> (b) Came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come; or
>
> (c) Took into account matters which it should not have taken into account; or
>
> (d) Failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See *Environmental Defence Society Inc v Mangonui County Council* (1988), 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 Limited* (1987), 12 NZTPA 76, 81-2.

[31] These observations have been cited and followed in numerous cases and I adopt them for the purposes of this appeal.

[32] I will address the jurisdictional issue first – namely whether or not the Environment Court had jurisdiction to amend the District Plan in a way which was not sought in the plan change as notified and which was not expressly sought by any submitter or cross submitter – and then deal with the Environment Court's approach to the trade competition prohibition under s 74(3), and whether that approach subverted unchallenged objectives and policies in the District Plan.

Jurisdiction of the Environment Court to amend District Plan

Explanation to objective C04 – the Council's and the Environment Court's decisions

[33] GDL focused on the explanation to objective C04.

[34] The Council decision on the explanation adopted the wording proposed in the plan change as notified – see [24] above – with one exception. In the second line of the second paragraph it deleted the word "possible" and replaced it with the word "feasible".

[35] The provenance of that change is unclear. It was not sought in any submission, but counsel were agreed that nothing turns on it.

[36] The notices of appeal filed in the Environment Court by NTC and Bilimag sought that the explanation to objective C04 should be further amended, by adding after the words "where it is not feasible" the words "or is inappropriate".

[37] The consent order submitted by Bilimag, NTC and the Council went beyond the notices of appeal. It sought to delete the explanation to objective C04 in its totality, and to replace it with the following:

> The District Plan anticipates that visitor-intensive activities will generally be located in the Town Centres zone. It is also recognised that there may be circumstances when large scale visitor-intensive activities may be appropriately located in the General zone including poor site availability in the Town Centre zone or avoidance of adverse effects on Town Centre amenity. It is therefore appropriate to provide for visitor-intensive activities as permitted activities in the Town Centre zone and to complement that with provision for consideration of large scale visitor-intensive activities in the General zone.

[38] It was this version of the explanation to objective C04 which was ultimately approved by the Environment Court.

[39] The Environment Court considered whether it had jurisdiction to make the amendment. It referred to the decision of the full Court in *Countdown Properties*. It also referred to the decisions in *Vivid Holdings Limited (Re an application)* [1999]

NZRMA 467, *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408, and *Campbell v Christchurch City Council* [2002] NZRMA 332 at [20]. The Environment Court stated at [33] as follows:

> The issue therefore is whether the changes where jurisdiction is challenged seek to materially depart from the basic premise of the notified version of the Plan Change and its supporting documentation. Or to put it another way, whether the change sought falls **"fairly and reasonably"** or by **"reasonable implication"** within the general scope of a submission and/or the proposed plan as notified.

It then found at [45] as follows:

> We find that the words *"or [is] inappropriate"* are within the Court's jurisdiction. We consider the reworded phrase contained in the consent documentation is sufficiently connected, all-be-it tenuously. The reworded phrase is an iterative extension of the matters discussed at the Council hearing and no one would be disadvantaged by the proposed amendment.

GDL's appeal – jurisdiction to amend

[40] The first question of law posed by GDL in the notice of appeal as question 3[a] is expressed as follows:

> Is the Environment Court empowered to grant relief to an Applicant for a plan change to amend the District Plan in circumstances where the relief sought:
>
> a) was not included in the Notified Plan Change or associated reportage;
>
> b) was not included in submissions on the Notified Plan Change (including the submission by the Applicant);
>
> c) was not included in the Decisions version of the Plan Change; and
>
> d) materially affects the interpretation and application of unchallenged objectives and policies of the District Plan.

[41] The question widely expressed, but it was common ground that it is confined to the explanation for objective C04 which the Environment Court ultimately approved. The question is also not well worded – because it assumes propositions which are open to debate – in particular that the amendment materially affects the interpretation and application of the District Plan.

[42] An additional question – question 3[g] – read as follows:

> Was the Environment Court required to determine that sufficient retailing opportunity existed in order to maintain objectives to focus attention entirely on areas surrounding the Town Centre?

[43] Although the connection between the two questions is not obvious – at least to me – no separate argument was mounted by GDL in regard to question 3[g]. Rather this question was subsumed within the argument presented on question 3[a].

Submissions for GDL

[44] GDL says that the specific explanation to objective C04 approved by the Environment Court was not included in the plan change as notified.

[45] Mr Gardner-Hopkins referred me to the various statutory provisions. He pointed out that the request for the plan change was made pursuant to cl 21 in the First Schedule to the Act. The Council accepted it, and proceeded to notify it under cl 26. Pursuant to cl 29(1), Part 1 of the First Schedule applied. Any person was able to make a submission to the Council on the proposed plan change – see cl 6. Any submission was to be in the prescribed form; Form 5 in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. *Inter alia* that form states that a submission should detail whether the submitter supports or opposes the specific provisions, or "wish[es] to have them amended". Notification was given by the Council of the submissions – cl 7 – and there was then the opportunity for further submissions – cl 8. A hearing was held by the Council – cl 8(b). It was required to give its decision, including its reasons for accepting or rejecting the submissions – cl 10(1). There was then the appeal to the Environment Court – cl 14(1). That clause provides that a person who made a submission may appeal. Relevantly, cl 14(2) provides as follows:

> 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.

[46] The submission made on behalf of GDL was that the explanation to objective C04 approved by the Environment Court had not been referred to in any submission.

[47] Mr Whata submitted that the amendment reflected a major shift in emphasis. He submitted that it:

a) removes the policy thrust to consolidate retailing in core areas, unless it is not possible to locate that activity in those areas;

b) recognises largely unfettered circumstances when large scale visitor activity may be appropriately located outside of the core areas;

c) endorses provision for consideration of large scale visitor-intensive activity outside core areas.

[48] He submitted that the amendment had not been foreshadowed by the submission process or subsequently until the appeal stage, and then only in the consent order. He emphasised that the plan change had been overtly promoted:

a) as having no impact on the broad strategy of consolidation of visitor-intensive activity (particularly retailing) within the town centres zone;

b) as continuing to protect the town centre from the adverse effects; and

c) as a no risk plan change.

As he put it, if the explanation is changed, the public "could quite rightly claim to have been played false …", because members of the public would have had no opportunity to have input into it, and could not have anticipated it.

[49] He accepted that the amendment is a change to an explanation, but submitted that it is still significant, and that explanatory notes can be relevant to the interpretation of objectives and policies.

[50] He referred to the case law to the effect that amendments to a plan cannot go beyond the scope of what is fairly and reasonably raised in submissions on a plan change, and submitted that, in the absence of a submission seeking a change to the broad strategy of the District Plan, there was no jurisdiction for the Environment

Court to re-write the explanation to objective C04 and that the Court had erred in doing so.

Submissions for the Council, Bilimag and NTC

[51] Mr Lang for the Council submitted first that the amendment made by the Environment Court to the explanation to objective C04 did not amount to a change to the broad strategy contained in the District Plan. He argued that the amendment was consistent with the plan change proposal when read as a whole, and that it was a change that could reasonably have been anticipated to result from consideration of the plan change proposal by the Council and by the Court. He referred specifically to the suite of proposed changes to the objectives and policies, including the addition of objective C05, and the addition of the further policy C04A. He submitted that these changes clearly signalled an intention to expand the range of opportunities for location of general zones to complement the town centres zone. He submitted that the proposed changes have a common purpose and theme, namely to provide greater flexibility in the strategy for managing visitor-intensive activity and development, and that, in that context, the changes to the explanation to objective C04 are consistent with the intent and theme of the proposed plan change, and could have been anticipated as a potential outcome of the plan change process.

[52] He also submitted that NTC had referred to the issue of location of large format retailing in its submission. He referred in particular to paragraph 3.5 which reads as follows:

> Vehicle-orientated large format retailing is a legitimate form of retailing and land use is best suited locations beyond the town centre.

As Mr Lang put it, the submission involved NTC in that issue and gave fair indication to any reader that NTC might pursue the issue of the location of large format retailing in the plan change process, in a way that assisted large format retailing locating outside the town centre.

[53] Much the same arguments were made by Mr Muldowney on behalf of Bilimag, and Mr Clay on behalf of NTC.

Analysis

[54] The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area. To this end the Act requires that public notice be given by a local authority before it promulgates or makes any changes to its plan. There is the submission/further submission process to be worked through. A degree of specificity is required in a submission – cl 6 in the First Schedule and Form 5 in the Regulations. Those who submit are entitled to attend the hearing when their submission is considered and they are entitled to a decision which should include the reasons for accepting or rejecting their submission. There is a right of appeal to the Environment Court but only if the prospective appellant referred to the provision or the matter in the submission – cl 14(2) of the First Schedule.

[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.

[57] The Act recognises this. Clause 14(2) requires only that the provision or matter has been referred to in the submission.

[58] In relation to amendments proposed to plan changes, the Court in *Countdown Properties* formulated the following test at 166:

> 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. … 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.

[59] In *Royal Forest and Bird Protection Society Inc*, Pankhurst J at 413 adopted the *Countown Properties* test and went onto comment as follows:

> … 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.

[60] This approach requires that the whole relief package detailed in submissions be considered when determining whether or not the relief sought is reasonably and fairly raised in the submissions – see *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [44].

[61] Here the change to the explanation to objective C04 was not specifically sought in any submission or further submission. NTC's submission supported the plan change, and highlighted the features of large format retailing which potentially make it inappropriate within the Town Centres zones. It did not however seek to change the explanation to objective C04. The submission as a whole did not contain anything which approximates the wording or the approach contained in the proposed explanation. Rather the submission endorsed the plan change as notified, recorded that it incorporated "appropriate provisions", and sought that it be approved without amendment. In my view it cannot be said that the change to the explanation to objective C04 falls fairly and reasonably within the scope of NTC's submission.

[62] Nor in my view is the change to the explanation signalled in the proposed plan change as notified. I accept Mr Lang's argument that the change to the explanation is consistent with the overall tenor of the plan change, and in particular with new objective C05 and new policy C04A. That broad consistency however did not to my mind signal to the public that the explanation to objective C04 might be altered in the way ultimately approved by the Environment Court. Members of the public reading the public notice of the plan change, and the summary of submissions on it, were entitled to assume that no amendment was proposed or sought to the explanation to objective C04 beyond that signalled in the plan change as notified.

[63] In my view councils, and the Environment Court on appeal, should be cautious in making amendments to plan changes which have not been sought by any submitter, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not the affect the overall tenor of the plan change. I doubt that that conclusion should be too readily reached. Lawyers and planners will often seek to bolster their arguments by reference to particular provisions contained in a plan, and that it is difficult in advance to predict how significant or otherwise certain passages or words in a plan may prove to be. To reason that an amendment can be made because it is consistent with the broad tenor of a plan change, begs the question – why is it being belatedly sought by one side and why is being resisted by the other?

[64] It is ultimately a question of degree, and perhaps even of impression, but in my view the Environment Court erred when it found that the explanation contained in the consent documentation was sufficiently connected to the plan change and the submissions to warrant its approval. There is nothing in either the change or the submissions to establish that connection. Moreover, I cannot see that the re-worded explanation is an "iterative extension" of matters discussed at the Council hearing as suggested by the Environment Court. Even if it were, I do not consider that this permitted the amendments approved by the Environment Court. Notwithstanding an obiter passage in *Countdown Properties* at 167 which might suggest to the contrary, in my view what was discussed at the Council hearing is irrelevant when considering whether or not there is jurisdiction to approve an amendment to a plan change. Rather it is the terms of the proposed change and the content of submissions filed which delimit the Environment Court's jurisdiction. What occurred at the Council or the Environment Court hearing and whether or not anyone would be disadvantaged by the amendment are matters more appropriately addressed by the Environment Court when it is considering whether or not s 293 of the Act should be invoked.

[65] In my view the Environment Court did not have jurisdiction as a matter of law to approve the amendment to the explanation to objective C04.

[66] The Council, Bilimag and NTC, argued that even if the Environment Court did not have jurisdiction to amend the explanation, that any error it made in this regard was immaterial, because the Court clearly signalled that it was prepared to invoke its powers under s 293 to direct the Council to make the amendment. Mr Whata submitted that the Environment Court's indication at [53] that it would not have hesitated to invoke s 293 was bound up with its approach to what he called the "trade competition filter". This leads directly to the other second key issue raised by the appeal. I deal with this and then return to the s 293 point below at [102] to [106].

Section 74(3) – trade competition – unchallenged objectives/policies

Section 74(3) – Environment Court's decision

[67] Having determined that it had jurisdiction to approve the amendment to the explanation to objective C04, the Environment Court then went onto consider whether or not it should approve the plan change. It considered the relevant statutory framework, and noted the submissions made by GDL. It then summarised what it saw as the single crucial issue before it as follows:

> Whether the plan change is the most appropriate way to enable large format retailing having regard to the objectives and policies that seek to accord primacy to the town centre.

[68] It discussed the relevance of retailing effects and referred specifically to s 74(3). It noted that it was common ground that flow on effects, or more precisely the consequential social and economic effects, caused by a change in trading patterns was a matter it must have regard to. It discussed what amount to consequential social and economic effects by reference to the judgment of Randerson J in *Northcote Mainstreet Incorporated & Ors v North Shore City Council* (2004) 10 ELRNZ 146. In considering the appropriate balance to be adopted when considering these flow on effects, it referred to the Supreme Court decision in the same case, which is reported as *Discount Brands Ltd v Westfield (New Zealand) Limited* [2005] 2 NZLR 597. In that case the Court found that effects must be "significant" before

they can properly be regarded as being beyond the effects ordinarily associated with trade competition: at [120].

[69] The Environment Court took the term "significant" to mean consequential upon or beyond effects ordinarily associated with trade competition on trade competitors.

[70] It then considered the evidence before it and concluded *inter alia* that the proposed new retailing centre which would be enabled by the plan change would not have consequential flow on effects on the town centre either in the medium or long term other than what could be expected by normal trade competition – see [142(iv)]. It concluded that the plan change was the most appropriate way to enable large format retailing having regard to the unchallenged objectives and policies in the plan that seek to accord primacy to the town centre.

GDL's appeal – s 74(3)

[71] GDL's notice of appeal posed the following questions:

> - Was the Environment Court required by law (including s 74(3) of the Act) to disregard any effect on the Town Centre ordinarily associated with trade competition or expected by normal trade competition, irrespective of the unchallenged objectives and policies of the District Plan to protect the town centre?
>
> - What is the meaning of trade competition under s 74(3) of the Act?
>
> And/or
>
> - Was the Environment Court required by law to have regard to all effects on the Town Centre, including those effects ordinarily associated with trade competition, where assessment of those effects is relevant to the attainment of the unchallenged objectives and policies of the District Plan referred to in paragraph 2(b)(i) – (iii) above?
>
> And in particular:
>
> - Was the Environment Court required to assess the Plan Change against *any* adverse impact it might have on the Town Centre, and the unchallenged objectives and policies identified in the District Plan to protect the Town Centre.

[72] In addition, the notice of appeal queried whether the Environment Court adopted an incorrect threshold of effects, and a wrong definition of the words "no more than minor" contained in the plan, and alleged that its decision was irrational – questions 3[f] and [h].

[73] Mr Muldowney submitted that the errors are linked, and that they are capable of being distilled down to one core proposition – namely the alleged subversion of the unchallenged objectives and policies of the District Plan via collateral operation of the trade competition ban. Mr Whata expressly accepted that this analysis was correct. I therefore deal with all of these alleged errors together.

Submissions for GDL

[74] GDL submitted that the most important matter for the Environment Court to determine was whether the proposed new centre would have a more than minor effect on the town centre. It noted the Environment Court's conclusions that the distributional effects of the proposed new centre would have no effect on the town centre "other than what could be expected by normal trade competition" – [141] – and that the new centre would not have consequential flow on effects on the town centre in either the medium or long term "other than what could ordinarily be expected by normal trade competition" – [142(iv)]. Mr Whata referred to the passage from the decision of Blanchard J set out below at [89], and then went on to submit that context is everything. He argued that in the present case, there were unchallenged objectives and policies in the District Plan which seek to accord primacy to the town centre, and which embrace a broad strategy of consolidation of visitor intensive activities in the town centre. He submitted the Environment Court should have assessed the effects of the plan change against *any* adverse impact it might have on the town centre, and against these unchallenged objectives and policies. He relied on a passage in the judgment of Elias CJ in *Discount Brands* at [17]. He submitted that in the circumstances, it was erroneous and contrary to the explicit objectives of the District Plan to disregard effects that materially reduce the visitor intensive activity in the core areas, and affect the primacy of the town centre as the focal point for visitor intensive activities.

[75] Further, he submitted that there is nothing in s 74(3) that requires the Court to disregard effects that are relevant to the attainment of legitimate resource management purposes as manifested in unchallenged objectives and policies. He submitted that the words "trade competition" used in s 74(3) mean the operation of the market, comprising producers, retailers, and consumers of goods, and that the prohibition on having regard to trade competition does not prevent consideration of adverse effects on the environmental quality of town centres, if the district plan identifies that value as being important to the community. It was his submission that the section does not require effects "ordinarily associated with" or "expected by normal" trade competition to be disregarded; rather it requires that "trade competition" be disregarded. It was asserted that trade competition ought not to be given a meaning that is inconsistent with the attainment of sustainable management, and that in the present context, due regard should have been given to the direct impacts on visitor-intensive activity in the town centre, irrespective of the fact that those impacts are ordinarily associated with trade competition. He submitted that the Environment Court had failed to assess those direct impacts, because it relied on what he called the "trade competition filter" derived from the passage in the judgment of Blanchard J.

Submissions for the Council, Bilimag and NTC

[76] Counsel for the Council, Bilimag and NTC variously argued that GDL's appeal attempted to subvert clear and express prohibition in s 74(3) against having regard to trade competition.

[77] It was submitted that the starting point is the wording in the section itself, and that the Court, applying s 5(1) of the Interpretation Act 1999, should take a purposive approach to the interpretation and application of the subsection. It was said that GDL's appeal attempts to subvert the prohibition by blurring the accepted definition of trade competition, and suggesting that if the proposed objectives and plan call for an assessment of any effects, then the s 74(3) prohibition should give way to the proposed objective. It was submitted that the subsection is intended to exclude trade competition (including its effects) from consideration. It was said that

the counterpart section, section 104(3)(a), has been consistently interpreted in this manner, and that to exclude the effects of trade competition from consideration would be inconsistent with the scheme of the Act. It was argued that the Courts have recognised that limiting trade competition to effects solely on trade competitors is unworkable, given the inter-relationship between trade competitors and their market. It was argued that trade competition effects include both direct effects on trade competitors, and the broader social and economic effects on those they serve, and that the line is drawn at the point where those broader social and economic effects become significant. Effects which do not reach the "significant" threshold have been described by the Court as effects ordinarily associated with trade competition and trade competitors, or effects normally associated with trade competition on trade competitors. It was submitted that there was no inconsistency between the judgments of Elias CJ and Blanchard J, and that both were consistent with the proposition that trade competition effects must be disregarded, and whether in the context of a notification decision (as in *Discount Brands*) or in relation to a decision whether or not to adopt a plan change. It was submitted that the Environment Court had correctly applied Blanchard J's significance test, that it had undertaken a detailed analysis of the evidence, and properly concluded that no such effects arose.

Analysis

[78] Section 74(3) provides as follows:

> In preparing or changing any district plan, a territorial authority must not have regard to trade competition.

It was introduced to the Act in 1997 by the Resource Management (Amendment) Act 1997.

[79] There is a similar provision in s 104(3)(a) which provides that a consent authority must not have regard to trade competition when considering an application for a resource consent.

[80] The original prohibition was contained in what was s 104(8). It was limited to resource consent applications and it was in rather narrower terms. It read as follows:

> When considering an application for a resource consent a consent authority shall not take into account the effects of trade competition on trade competitors.

[81] This provision was amended. It is now s 104(3)(a) and it is no longer necessary that the effects of trade competition be on trade competitors before they become an irrelevant consideration. The amendment widened the scope of the subsection to trade competition *per se* regardless of who is affected. This was acknowledged by the then Planning Tribunal in *Affco v Far North District Council No. 2* [1994] NZRMA 224 at 237.

[82] Parliament has not seen fit to define the words "trade competition", and in my view wisely so. The words are ordinary English words, and they should carry their ordinary and common sense meaning. They refer succinctly to the rivalrous behaviour which can occur between those involved in commerce.

[83] Mr Whata sought to argue that s 74(3) requires simply that "trade competition" be disregarded – and not its effects. I agree with Mr Muldowney that this is sophistry. The Act is effects based, and s 74(3) is in my view intended to ensure that trade competition, and its effects, are not to be had regard to in preparing or changing a district plan.

[84] The base proposition has long been that planning law should not be used as means of licensing or regulating competition – see *Northcote Mainstreet Incorporated* at [52] and the cases there cited. These comments were referred to by Blanchard J with apparent approval – see *Discount Brands* at [89].

[85] Read literally, the prohibition in s 74(3) could cut across other provisions contained in the Act, and in particular the purpose and principles of the Act set out in Part 2.

[86] The purpose of the Act is of course to promote the sustainable management of natural and physical resources, and the words "sustainable management" *inter alia* refer to the use and development of resources in a way which enables people and communities to provide for their social and economic wellbeing. Further s 7 requires all persons exercising all functions and powers under it to have particular regard to the efficient use and development of natural and physical resources, and to the maintenance and enhancement of amenity values. These broad provisions are backed up by the wide definitions given to the words "environment", and "amenity values" in s 2 of the Act.

[87] The Courts have striven to give effect to the statutory prohibition, and to the wider purposes and principles of the Act, by making it clear that it is only trade competition and those effects ordinarily associated with trade competition, which are required to be ignored under s 104(3)(a), and which cannot be had regard to when preparing or changing a district plan under s 74(3). Effects may however go beyond trade competition and become an effect on people and communities, on their social, economic and cultural wellbeing, on amenity values and on the environment. In such situations the effects can properly be regarded as being more than the effects ordinarily associated with trade competition.

[88] This proposition was discussed by the Supreme Court in *Discount Brands* and in particular by Elias CJ and Blanchard J. At [89], Blanchard J noted as follows:

> In his judgment in the High Court Randerson J observed that there was a statutory policy that the Act was not to be used as a means of licensing or regulating competition. Section 104(8) precluded a consent authority from having regard to the effects of trade competition on trade competitors when considering an application for a resource consent. But broader economic and social impacts might flow if a proposal were to result in the decline of an existing shopping centre to the extent that it would no longer be viable as a centre, with consequent adverse effects on the community as a whole or at least a substantial section of it:
>
> > Such effects might include the loss of investment in roading and other infrastructure as well as the loss of amenity which could result from the closure or serious decline in the attractiveness or viability of the centre as a whole. Loss of employment opportunities on a significant scale might also qualify as adverse effects for these purposes. So too the possibility that important community services associated

> with shopping centres might cease to be appropriately located to serve persons attracted to the shopping centre.

His Honour went on to confirm Randerson J's description of the threshold at which social and economic effects which may flow on from trade competition can become relevant, namely when they go beyond those effects normally associated with trade competition, and become significant. Blanchard J stated at [119] to [120] as follows:

> [119] An important matter which the council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres – on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.
>
> [120] The Court of Appeal considered that only "major" effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were "ruinous" the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be "significant" before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[89] GDL sought to rely on a passage at [17] in the judgment of Elias CJ in *Discount Brands*. It was suggested that there was an inconsistency between the judgments of Elias CJ and Blanchard J. The passage relied on reads as follows:

> In context, therefore, the application in the present case had to be assessed against any adverse impact it might have on the amenity values of existing shopping centres, and the policies identified in the district plan to confine business activities generally to centres within North Shore City identified by the district plan. It required the "thorough evaluation" provided for by policy 4, designed in particular to consider the impact upon the amenity values of the existing centres. And in policy 5 it looked to the "advocacy" of community-based groupings in the identification and promotion of "the essential qualities of individual centres".

[90] Particular emphasis was placed on the use of the words "any adverse impact". GDL submitted that the Environment Court in the present case should have assessed the effects of the plan change against *any* adverse impact it might have on the town centre.

[91] In my view, the passage in the judgment of Elias CJ in *Discount Brands* at [17] is not concerned with identifying the appropriate test for distinguishing between effects that are to be considered under the Act, and effects which may not be considered due to either ss 74(3) or 104(3)(a). The paragraph was concerned with the analysis that was appropriate in *Discount Brands*, given the district plan provisions there in issue. That is clear from the discussion of the district plan rules which precedes the paragraph, and by the use of the words "in context" at the beginning of the paragraph. It is apparent from other parts of her judgment that Elias CJ shared the view expressed by Blanchard J that while the effect of trade competition was irrelevant, other "wide ranging matters were required to be taken into account" – see, e.g. [8]. I do not consider that there is an inconsistency as asserted by GDL.

[92] The views expressed by Blanchard J were agreed with and adopted by the other Judges in the Court – see Keith J at [57], Tipping J at [142] and [150], and Richardson J at [178] and [179]. They formed part of the ratio of the case, and they are binding on the Environment Court and this Court.

[93] It follows that s 74(3) does not preclude a territorial authority preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed it is obliged to do so in terms of s 74(1).

[94] Mr Whata sought to elevate GDL's arguments by submitting that strict application of the *Discount Brands* test would mean that district plans could not provide for town centre consolidation, or prevent dispersal of commercial activity, unless there was a serious decline. I do not consider that this argument has any merit. Local authorities promulgating plans, or changing plans, must not have regard to trade competition, or to the effects which are normally associated with trade competition. The promotion of town centre consolidation, and the dispersal of commercial activity however are legitimate resource management issues, because they can raise significant social and economic concerns. Provision can properly be made for them in district plans.

[95] There is no set definition of those effects which are normally associated with trade competition, or those which are significant. The examples cited by Randerson J in *Northcote Mainstreet Incorporated* at [54], and by Blanchard J in *Discount Brands* at [119], provide a useful benchmark against which to evaluate alleged significant social and economic effects on a case by case basis.

[96] In my view the Environment Court in the present case was required to disregard trade competition and any effect on the town centre ordinarily associated with or expected from normal trade competition. That is what is required by the prohibition contained in s 74(3), as interpreted by the Supreme Court in *Discount Brands*.

[97] There are various objectives and policies contained in the District Plan which seek to protect the existing town centre, and which recognise its importance to the people and community it serves. Those objectives and policies are not inconsistent with the prohibition contained s 74(3) for the reasons I have explained above.

[98] GDL did rely on new objective C05, which seeks to provide for commercial activities outside the town centre zone where there are social and economic benefits, and where it can be demonstrated that any adverse effects on the environment of the town centre concerned *will be no more than minor*. GDL claimed that this objective sets the threshold, and that there is nothing in s 74(3) of the Act that requires the

Court to disregard effects that are relevant to the attainment of a legitimate resource management purpose.

[99] To my mind, GDL's argument is flawed. The statutory prohibition is the primary driver, and the wording contained in proposed objective C05 cannot undermine the statutory prohibition. The reference to adverse effects in objective C05 can only be a reference to relevant effects – i.e. those that are beyond the effects of trade competition. There is nothing in the Act which allows a district plan to modify the effect of s 74(3) in the way in which GDL contends. If Parliament had intended that district plans should be determinative, it could have introduced s 74(3) with the words, "subject to the rules in any district plan …". This approach has been taken in other provisions of the Act – see for example s 94D, which permits notification requirements to be modified by district plan rules.

[100] In my view the Environment Court did not err in its approach to trade competition issues. It did not proceed on an erroneous definition of threshold effects, and its decision cannot be said to be irrational. Rather it made a full assessment on the evidence before it, and it correctly applied s 74(3).

Materiality

[101] I have found the Environment Court erred when it concluded that it had jurisdiction to approve the amendment to the explanation to objective C04.

[102] That however is not the end of that matter. The Environment Court went on to observe as follows:

> [52] With regard to the possibility of applying section 293 of the Act is concerned, we agree that section 293 should be used cautiously and sparingly:
>
> (a) It deprives potential parties or interested persons of their right to be heard by the local authority;
>
> (b) The Court has to discourage careless submissions and references;

(c) The Court has to be careful not to step into the arena - the risk of appearing partisan is the great disadvantage of inquisitorial methods.

[53] However, if we are wrong with respect to our findings on the issue of jurisdiction we would have no hesitation in invoking section 293 of the Act. All of the matters contested reasonably arise out of the wording of the Plan Change as modified in the decisions version and are part of the natural progression of the planning process. There is unlikely to be any non-party affected and no one would be disadvantaged.

[103] The Council, Bilimag and NTC argued that the Environment Court had in fact exercised its discretion under s 293.

[104] I do not consider that that is the case. It is clear from the wording used by the Environment Court that it was simply indicating that, but for its finding on the issue of jurisdiction, it would have invoked s 293.

[105] Contrary to the submissions advanced for GDL, in my view the Environment Court has approached the issue of trade competition, and the prohibition contained in s 74(3) correctly, and there is nothing in its analysis which tainted its comments on the application of s 293. The Environment Court's preparedness to invoke s 293 provides an answer to the jurisdictional issue. The point becomes immaterial and I therefore decline to remit the matter to the Environment Court.

Conclusion

[106] Accordingly, the appeal is dismissed. The Council, Bilimag and NTC are entitled to costs. I direct that any application for costs is to be filed within 10 working days of the date of this judgment. Any response by GDL is to be filed within a further 10 working days. Any final submissions in reply by the Council, Bilimag and NTC are to be filed within a further five working day period. I will then deal with costs on the papers filed, unless I require the assistance of counsel.

Wylie J