

In the Environment Court of New Zealand
Christchurch Registry

I Te Koti Taiao o Aotearoa
Ōtautahi Rohe

ENV-2018-CHC-285

Under	the Resource Management Act 1991 (RMA)
In the matter of	an appeal under clause 14(1) of the First Schedule of the RMA in relation to the proposed Second Generation Dunedin City District Plan (2GP)
Between	The Preservation Coalition Trust
	Appellant
And	Dunedin City Council
	Respondent

Submissions of Counsel for Dunedin City Council in relation to jurisdiction on appeal point 70b – building and structure standards in Hill Slopes

18 December 2019

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May it please the Court

- 1 These legal submissions address whether the Preservation Coalition Trust's (**PCT**) appeal (appeal point 70b) on Dunedin City Council's (**Council**) proposed Dunedin City Second Generation District Plan (**2GP**) is within scope and therefore whether the Environment Court has jurisdiction to consider PCT's appeal.

Overview

- 2 Council has taken the position that the Notice of Appeal and the List of Key Issues prepared by the Appellant for the first time raised a number of very restrictive proposed rules intended to apply in landscape and coastal overlay zones and the Hill Slopes Rural Zone. Many of these restrictions in the Notice of Appeal and List of Key Issues dated 16 April 2019 were considered by Council to be outside the scope of the issues previously raised by the submission.
- 3 The Appellant has, in paragraph 19 of the Affidavit of Mr Werner dated 3 December 2019 (**Affidavit**), significantly reduced the scope of the issues to be pursued on appeal. Council considers that the issues in paragraph 19 of that Affidavit are back within scope of the Appellant's submission and properly fall within the Environment Court's jurisdiction.
- 4 These submissions track the progression of the submission, Notice of Appeal, List of Key Issues and Affidavit. Council proposes a determination by consent that the relief now sought in paragraph 19 of the Affidavit is within scope of the Environment Court's jurisdiction. This determination, by consent, is proposed to ensure that the Court and the parties are clear on the relief that is now sought and to ensure further changes to that are not made by the Appellant following this jurisdictional hearing.

Statutory basis for scope

- 5 The starting point for considering issues of scope is clause 14 of Schedule 1 to the RMA. This clause provides for the right to appeal to the Environment Court in respect of a provision included in a proposed plan:

14 Appeals to Environment Court

- (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
 - (a) a provision included in the proposed policy statement or plan; or
 - (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or

- (c) a matter excluded from the proposed policy statement or plan; or
 - (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
- (2) However, a person may appeal under subclause (1) only if—
- (a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and
 - (b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

...

- 6 It is my submission that clause 14(2)(a) of Schedule 1 to the RMA provides that the Environment Court has the jurisdiction to consider appeal point 70b only if PCT has reasonably and fairly referred to the relevant provision, or the matter, in PCT's submission on the 2GP. This question needs to be approached in a "realistic workable fashion, rather than from the perspective of legal nicety". These principles are derived from the following cases.

Legal test for scope

- 7 The leading cases on the issue of scope are the High Court's decisions in *Countdown Properties (Northland) Ltd v Dunedin City Council*¹ (**Countdown**) and *Royal Forest and Bird Protection Society Inc v Southland District Council*² (**Royal Forest and Bird**)³.
- 8 In *Countdown* the Court concluded at paragraph 166 that in deciding whether a plan amendment was properly made (**emphasis added**):

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.

¹ *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145

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

³ These principles were recently discussed by the Environment Court in relation to clause 7 of Schedule 1 to the RMA in *Arthurs Point Outstanding Natural Landscape Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 150, at [60]-[71]

9 In *Royal Forest and Bird* the Court adopted *Countdown* and stated at page 413:

[T]he 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.

10 These decisions were cited with approval in the Environment Court case *Re an application by Vivid Holdings Limited*⁴. The Court in this case stated at paragraph 19 that:

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

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

11 The Environment Court considered whether the relief sought by the Appellant in *Campbell v Christchurch City Council*⁵ was "fairly and reasonably raised" in the submission. After considering previous High Court cases the Court held that when considering what relief could be granted, even if not expressly sought as such in a submission, or when considering if the submission clearly expressed certain relief, the test was the same namely "*does the submission as a whole fairly and reasonably raise some relief, expressly or by reasonable implication, about an identified issue?*"⁶

12 In considering whether a submission "reasonably" raises any particular relief, the Environment Court stated that the following factors need to be considered⁷:

⁴ *Re an application by Vivid Holdings Limited* [1999] NZRMA 468

⁵ *Campbell v Christchurch City Council* [2002] NZRMA 332

⁶ *Campbell v Christchurch City Council* [2002] NZRMA 332 at [18]

⁷ *Campbell v Christchurch City Council* [2002] NZRMA 332 at [42]

The submission must identify what issue is involved (**Vivid**⁸) and some change sought in the proposed plan;

The local authority needs to be able to rely on the submission as sufficiently informative for the local authority to summarise it accurately and fairly and in a non-misleading way (**Montgomery Spur**⁹); and

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

- 13 The Environment Court held at paragraph 53 that in undertaking this test the correct approach is to "...look at the submission in light of Council's summary of submissions..." The Court found that the appeal was within scope for the following reasons:

- (a) The council officers, in summarising the submissions, had managed to spell some coherent relief out the Appellant's submission; and
- (b) The references to locations in the original submission had been translated into the summaries of the relevant planning maps.

- 14 The Environment Court in *Cook Adam Trustees Ltd v Queenstown Lakes District Council*¹⁰ (**Cook Adam Trustees**) took a more flexible approach to scope. The Court stated¹¹:

How far can a decision diverge from a submission or appeal? In *Countdown Properties (Northlands) Ltd v Dunedin City Council*¹² the Full Court wrote of submissions¹³:

... 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.

- 15 The Environment Court in *Cook Adam Trustees* observes that councils customarily face multiple submissions, often prepared by persons without professional help. To reflect this, councils need scope to deal with the realities of

⁸ (1999) 5 ELRNZ 264 at para 19.

⁹ (1999) 5 ELRNZ 227.

¹⁰ *Cook Adam Trustees Ltd v Queenstown Lakes District Council* [2013] NZEnvC 156

¹¹ *Cook Adam Trustees Ltd v Queenstown Lakes District Council* [2013] NZEnvC 156 at [28]

¹² *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 165.

¹³ *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 166.

the situation. The Court again refers to, and agrees with, the High Court in *Countdown* which states¹⁴:

... To take a legalistic view that a council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the council in its decision.

- 16 The Environment Court in *Progressive Enterprises Ltd v Hastings District Council*¹⁵ cited *Environmental Defence Society v Otorohanga District Council*¹⁶ where the Environment Court in that case stated that¹⁷:

A careful reading of the text of the relevant clauses of Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope. Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks a change to the proposed plan, then the submission should set out the specific amendments sought...The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of a council must be in respect of identified provisions or matters.

Original submission: proposed new Rule 16.6.13

- 17 In regards to appeal point 70b, the original submission from PCT¹⁸ (Attachments 1 and 2 to the agreed bundle) seeks to introduce new development performance standards, being a proposed new Rule 16.6.13 for building and structure size and quantity. This was set out on page 30 of the original submission.
- 18 An updated version of proposed Rule 16.6.13 was presented to the Hearing Panel by HPPC and on which the Hearing Panel made its decision. This is Attachment 2 to the agreed bundle and is the key submission document on this issue. This is as follows:

¹⁴ *Cook Adam Trustees Ltd v Queenstown Lakes District Council* [2013] NZEnvC 156 at [28]

¹⁵ *Progressive Enterprises Ltd v Hastings District Council* [2015] NZEnvC 187

¹⁶ *Environmental Defence Society v Otorohanga District Council* [2014] NZEnvC 70

¹⁷ *Progressive Enterprises Ltd v Hastings District Council* [2015] NZEnvC 187 at [12]

¹⁸ This submission is also referred to as from HPPC (OS477.5)

NEW 16.6.13 Building and Structure Size and Quantity⁴. The following rule applies in all landscape and all coastal overlays, ONFs¹, and the Hill Slope Rural Zone². (An exception is allowed for sites created by subdivision before _____, 2016 or purchased before that date.)

Structure Quantity⁴ – Activity Status

Building & Structures for:	Max. Gross Floor Area⁴	Under 200 ha.	Max.⁶	Over 200 ha.	Max.⁶
Commercial-Produce Stall	10 sq.m	1-P, 2-D, 3-NC	3	1-P, 2-D, 3-NC	3
Farming, Forestry or Grazing	750 sq.m	1-P, 2-NC	2	2-P, 3-D, 4-NC	4
Other Rural Activities ¹	500 sq.m	1-D	1	1-P, 2-D, 3-NC	3
Standard Residential plus Garage(s)	350 sq.m	3 ² 1-P, 2-NC	3	3 ² 1-P, 2-D, 3-NC	3 ^{2,6}
Community & Leisure Activities	200 sq.m	NC	-	1-D	1
Sport & Recreation or Visitor Accommodation	60 sq.m	1-P, 2-NC	2	2-P, 3-D, 4-NC	4
All Building & Structures Less than 60 sq.m. ³	NA	1-P, 2-D, 3-NC	3 ³	2-P, 3-D, 4-NC	4 ³
Max. Total⁶ 5-P, 7-D Max. Total⁶ 7-P, 10-D					

- 1 Factory farming, rural ancillary tourist-large scale, rural industry, other industrial, crematoriums, other major facilities, rural research-large scale.
- 2 ~~Three possible residences is the additional residence development standard for that Rural Zone that has been set in 2GP.~~ Standard residential density for the less critical High Country, Hill Country, Middlemarch Basin and Taieri Plains is as shown in 2GP section 16.5.2.1.

- 3 Other than water tanks and pump shelters.
- 4 This is an aggregate area for all structures in that activity class. Includes additions and alterations and outdoor storage.
- 5 ~~Development~~ Buildings and structures that contravenes the performance standard for building and structure size, and quantity ~~becomes a non-complying activity.~~ or exceeds the activity type maximum number or the maximum total number is non-complying.
- 6 The "Maximum Total" is not the sum of the "Maximum" column, but rather smaller 'totals' that reflect a restriction on the total number of structures for the allowed activities listed. As 16.6.13 addresses our most sensitive areas, it is recommended that developers choose among the activities requiring structures on the site and would not be allowed the combination of the maximum total structures (as in 'multiplied by') for the maximum number of activity types.

- 19 The reasons presented in the original submission for Rule 16.6.13 are set out on pages 30-31 in Attachment 1 to the agreed bundle (and in Attachment 2).

Hearing Panel's Decision

- 20 The Hearing Panel's decision is set out in pages 171-172 and paragraphs 959-961 on page 173 included in the agreed bundle as Attachment 3.
- 21 In summary, the Hearing Panel rejected HPPC's submission on the basis that the new performance standard specifying the size and number of permitted buildings and structures for different land use activities in the Hill Slopes Rural Zone and for landscape and coastal overlay zones was too prescriptive:

959. We reject the *HPPC* submission (as we understood it), to add a new performance standard specifying the size and number of permitted buildings and structures for different land use activities in the Hill Slopes Rural Zone and for landscape and coastal overlay zones. We agree with the Reporting Officer that the proposed standard is far too prescriptive. We also note that the submitter provided no evidence of any resource management issue arising to date or any specific examples of where a proliferation of buildings and structures had been a cause for concern in the rural zones. The Reporting Officer was not aware of any either.

960. We note that the submitter clarified at the Rural Hearing that the new standard was being sought for landscape and coastal character overlay zones only, although the written submission and

subsequent clarification clearly state that the standard is sought for the Hill Slopes Rural Zone. We issue this decision in the absence of any advice that this part of their submission has been formally withdrawn.

961. We do have some sympathy for the notions expressed in the submission, and in the evidence of the DCC's expert landscape architect, that there may be some merit in taking a precautionary approach toward possible future proliferation of buildings and structures in the rural zones. We do not have the scope from this submission to provide a workable cross-city rule and acknowledge that most of Mr Moore's suggested methods were outside the scope of the submission. The submitter's concern will however be met in part by a reflectively rule for large buildings and structures in the Hill Slopes Rural Zone, that we are introducing in response to submissions from *HPPC* and *STOP* (See Natural Environmental Decision).

Appeal by the Preservation Coalition Trust

22 There are two aspects to the relief sought by PCT in their amended Notice of Appeal dated 9 February 2019 for appeal point 70 (with one minor correction issued 16 April 2019). This relief was set out in the Notice of Appeal under the heading "Natural Environment... Rule 10.3", on pages 2-4. This has caused the jurisdictional issue because this sought¹⁹:

- (a) A new building and structure screening standard for ONF, ONL, SNL, ONCC, HNCC, NCC overlays and the Hill Slopes Rural zone; and
- (b) Inclusion of rules in the Natural Environment and Rural sections for all activity status types in all landscape and coastal overlays and the Hill Slope Rural Zone to avoid, remedy or mitigate adverse effects on landscape naturalness, with the following examples provided:
 - a. A land use maximum of one residential activity plus one family flat per site.
 - b. The single-family flat must be fully attached (not only a connecting corridor) or located in the same building.
 - c. A development maximum of one building greater than 60 sq.m. per site.

¹⁹ The Notice of Appeal is included in the agreed bundle as Attachment 4

- d. A development maximum of one building less than 60 sq.m. per site to serve non-residential, non-accommodation purposes.
 - e. A development maximum of five structures of less than 40 sq.m. to serve any and all activities permitted in the site's rural zone.
 - f. All buildings and structures shall be a single, enclosed footprint design. 'Compound' or pavilion structure designs shall be prohibited. Such designs typically feature small modules interlinked by courtyards, corridor passages, gardens, etc. and can potentially double the visual bulk of buildings and structures.)
 - g. Except for a platform specified on a site's title, prior to November 7, 2018, two permitted buildings, if over 10 sq. m., shall be located on a landscape building platform determined by a registered landscape architect. The platforms will then be registered on the site's title. The methods and criteria for location shall be drafted for the Plan through landscape architect and planners' caucus.
3. With the exception of a +10% size differential for the one under 60 sq.m. building, or the 40 sq.m. maximum structures, rule contravention shall be prohibited.

23 This Notice of Appeal raised for the first time a number of very restrictive concepts such as:

- (a) A maximum of one building less than 60m² for non-residential use;
- (b) A maximum of five structures less than 40m² to serve each site in the rural zone;
- (c) The idea of requiring single footprint structures with compounds prohibited;
- (d) "Landscape platforms" for any two building over 10m²; and
- (e) Any changes in scale exceeding 10% in size are prohibited.

24 These changes were repeated in the PCT List of Key Issues dated 16 April 2019 (included as Attachment 5 to the agreed bundle) at pages 6 and 7 under the heading "Issue Four: performance Standards..."

The changes now in paragraph 19 of the Affidavit dated 3 December 2019

25 PCT has now significantly amended its relief sought in paragraph 19 of the Affidavit of Mr Werner in relation to appeal point 70b as follows:

Building and Structure Standards:

- a) Performance standards for building and structure scale, size and bulk apply in ONF, ONL, SNL, ONCC, HNCC and NCC overlays and the Hill Slopes Rural Zone to preserve the naturalness of the area.
- b) The total area of all buildings and structures larger than 4 sq. m. on a site does not exceed whichever is the greater of 2 percent of the site area, or 700 sq. m.
- c) The area of the residential building shall not exceed 350 sq. m.
- d) The calculation of residential building 'area' shall include all terraces, pavilions, covered and uncovered, walkways between residential 'compound' elements which link those components.
- e) The defined 'area' shall also include all *covered* or roofed outdoor surface areas on the outer perimeter of buildings.

26 It is my submission that this relief is a significant reduction from the relief sought in the Notice of Appeal and List of Key Issues.

Council's position

27 Council relies on the Affidavit of Mr Werner in paragraph 19 as setting out the extent of the relief now sought by PCT. Paragraph 20 of the Affidavit states that the rewritten performance standard in paragraph 19 "clarifies the relief that PCT would seek in a hearing on this appeal point 70b". This relief is described by the Appellant as a "clarification" but is actually a significant change from the appeal and List of Key Issues.

28 Council's position is that this relief sought in paragraph 19 of the Affidavit is now back within scope of the submission. This is because:

- (a) It is assumed that paragraph 19(a) of the Affidavit refers to the performance standards for buildings and structure scale, size, and bulk that are set out in paragraphs 19(b)-(e) of the Affidavit;
- (b) Paragraph 19(b) refers to a combined total area for all buildings and structures that do not exceed either 2% of the site area or 700m². The submission, when it referred to new Rule 16.6.13, set out a range of maximum gross floor areas for a range of activities (this is included in the key submission document included as Attachment 2 in the agreed bundle). This proposed maximum square metre areas for all buildings and structures is now proposed by the Appellant as a single maximum for all

activities and is probably a hybrid of what was sought in the submission. As PCT point out in paragraph 15 of the Affidavit this topic was addressed in evidence by landscape experts at the Council's hearing and was an "issue" considered (see the discussion at paragraphs 957 and 958 of the Council's decision on page 173 of Attachment 3 to the agreed bundle);

- (c) The relief now sought in paragraph 19(c) of a maximum area for residential buildings of 350m² is directly from row 4 of the table on Attachment 2 to the agreed bundle, being the revised Rule 16.6.13 sought in the submission; and
- (d) The relief sought in paragraph 19(d) and (e) is explaining what is meant by "residential building" and is probably consequential on the relief sought in paragraph 19(c) referred to above.

- 29 This narrowing down of the relief in the Affidavit is a significant reduction in the rules that PCT was seeking. Council therefore accepts that this relief confined to that set out in paragraph 19 of the Affidavit is within scope and can proceed to be considered by the Environment Court within its jurisdiction.

For clarity and determination proposed

- 30 It is assumed as part of this jurisdiction argument that PCT confines its relief sought to that now set out in paragraph 19 of Mr Werner's Affidavit. To resolve this issue, it is proposed that the Environment Court issue a determination by consent that the appeal sought by PCT on point 70(b) has been reduced in its Affidavit and is within jurisdiction as set out in paragraph 19 of that Affidavit. This will ensure that the very restrictive issues raised in the Notice of Appeal and the List of Key Issues do not become resurrected as issues being pursued by the Appellant in the future. This is because Council considers many of those restrictive issues raised are outside of the scope of the submission and cannot be pursued on appeal.

- 31 The following draft determination is proposed:

- (a) The Appellant has, as part of this jurisdictional hearing, significantly reduced the relief sought to that in paragraph 19 of Mr Werner's Affidavit dated 3 December 2019. This is now the extent of the relief the Appellant seeks on this topic; and

- (b) The Environment Court determines, by consent, that the issues raised in paragraph 19 of the Affidavit of Mr Werner dated 3 December 2019 are within the Court's jurisdiction to consider.

Dated this 18th day of December 2019



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