Westfield (New Zealand) Ltd v Hamilton City Council

High Court Hamilton CIV-2003-485-000953-54 & 56
17 March 2004
Fisher J

Resource consent — Threshold for imposing more stringent district plan controls — Appeal on a question of law — Broad value judgment required — Ultimate issue matter for evaluation — No requirement to consider effects afresh — Absent specific issues Court can rely on local authority evidence — Whether conditions precedent negate the grant of resource consent — Balancing competing considerations a matter of judgment — Challenge to conditions more appropriate during resource consent process — Scope of appeals to the Environment Court — Resource Management Act 1991, ss 3, 5, 31, 32, 74, 75(1), 76, 105, 292, 293, 299.

Westfield, Kiwi and Wengate lodged appeals pursuant to s 299 of the Resource Management Act 1991 ("the RMA") against the decision of the Environment Court regarding appeals from the Hamilton City Council relating to the proposed district plan and the zoning of land in the commercial services and industrial zones which provided for intensive retail shopping malls as controlled activities.

Westfield and Kiwi alleged that the decision was wrong in law because it: (a) overestimated the legal threshold required under s 32 of the RMA before a restrictive rule could be justified; (b) failed to conduct its own inquiry into adverse effects; (c) failed to take into account the desirability of public participation in the resource consent process; and (d) misused the type of activity (ie controlled activities) as a means of controlling adverse traffic effects. They argued that retail activities in the commercial services and industrial zones should be restricted, and that unrestricted retail activity would have adverse traffic and consequential effects. They considered that provision should be made for intensive retail shopping malls as discretionary activities.

Wengate alleged that the Environment Court had no jurisdiction to reinstate a buffer zone to manage reverse sensitivity between land zoned for commercial services and neighbouring industrial properties when reinstating the commercial services zoning of the subject land, because those changes fell outside the scope of the original appeal.

Held (dismissing the appeals):

(1) When considering whether more stringent controls should be imposed on retail activities in the commercial services and industrial zones the Environment Court had to be satisfied that such a rule would be "necessary" to achieve the purpose of the RMA. While "necessary" was a relatively strong word, a broad value judgment wasrequired when applying the test under s 32 of the RMA. When assessing whether any adverse effects of providing for retail activities justified imposing more stringent controls the Court was required to consider the likelihood of such effects arising (ie as a question of degree) in the particular case before it, and was entitled to approach the matter in robust terms. The ultimate issue for the Court to determine (ie the level of likelihood of adverse effects arising in practice) was a matter of evaluation rather than being subject to a specific evidential burden or standard (see para [34].

(2) The Environment Court was under a duty to undertake a broad-based survey of the relevant activities under ss 32 and 76 of the RMA when determining whether a rule in a proposed plan would promote the sustainable management of natural and physical resources, but absent specific issues being raised by the appellants it was not required to conduct the inquiry afresh and was entitled to rely on evidence of the investigations and conclusions of the local authority (see para [40].

(3) Striking the balance between public participation in the resource consent process and avoiding the delay and expense inherent in enabling competitors to contest resource consent applications was a matter of judgment for the Environment Court when considering whether adopting a particular rule was the most appropriate means of controlling the effects of development. The Court had considered this issue and had not ignored other competing considerations which it was required to take into account under s 32(1)(c)(ii) of the RMA. Accordingly, the decision to provide for retail activity within the relevant zones as a controlled activity did not involve any point of law (see para [45]).

(4) It would normally be premature to challenge provisions in a proposed district plan on the basis that invalid conditions would result from the adoption of such provisions. Any challenge to conditions should more appropriately be made during the resource consent process. The rules in the proposed district plan enabled the local authority to include conditions of the grant of resource consent to control the effects of development on the external roading network. As a result there was nothing objectionable in a condition precedent being included on the grant of consent to address matters that would otherwise be outside the applicant's control, therefore including such conditions in relation to controlled activities would not "negate the consent" and would not as a matter of general principle be invalid. Similarly, the impact of such conditions on development by making it too expensive or uneconomic to give effect to would not render a condition invalid (see para [53]).

(5) When requested to reconsider the zoning of land on appeal, the Environment Court's jurisdiction was not limited to the specific terms of the relief sought by the notice of appeal, but extended also to the inclusion of other rules in the proposed district plan (eg the buffer zone) which

could be foreseen as being associated with such rezoning. As a result reinstatement by the Court of the buffer zone between the Wengate site and neighbouring industrial properties to manage reverse sensitivity that could otherwise adversely affect the site was not unsurprising when determining that zoning of the site should revert to commercial services, as the buffer zone had originally been included in the proposed district plan as publicly notified. Accordingly, no procedural unfairness resulted to Wengate or any other person as reinstatement of the buffer zone would have been within the reasonable contemplation of those persons who were aware of the scope of the appeal (see paras [73], [75], [76].

Cases referred to in judgment

Applefields Ltd v Christchurch City Council [2003] NZRMA 1

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145

Environmental Defence Society Inc v Mangonui County Council (1987) 12 NZTPA 349

Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257 (CA)

Grampian Regional Council v City of Aberdeen (1983) P & CR 633 (HL)

Housing New Zealand Ltd v Waitakere City Council [2001] NZRMA 202 (CA)

Newbury District Council v Secretary of State for the Environment [1981] AC 578

Ngati Maru Iwi Authority v Auckland City Council (High Court, Auckland AP 18/02, 7 June 2002, Doogue J)

North Holdings Ltd v Rodney District Council (High Court, Auckland CIV 2002-404-002402, M1260-PL02, 11 September 2003, Venning J)

Northland Regional Council, Re (Environment Court, Auckland 12/99, 10 Februaery 1999, Judge Sheppard)

NZ Suncern Construction Ltd v Auckland City Council [1997] NZRMA 419

Ravensdown Growing Media Ltd v Southland Regional Council (Environment Court, Christchurch C 194/000, 5 December 2000, Judge Smith)

Residential Management Ltd v Papatoetoe City Council (Planning Tribunal , Auckland A 62/86, 29 July 1986, Judge Sheppard)

S and D McGregor v Rodney District Council (High Court, Auckland CIV 2003-485-1040, Harrison J)

Vivid Holdings Ltd, Re [1999] NZRMA 467

Williams and Purvis v Dunedin City Council (Environment Court, Christchurch C 22/02 Judge Smith)

Appeal

This was an appeal by Westfield (New Zealand) Ltd, Kiwi Property Management Ltd and Wengate Holdings Ltd, the appellants, on questions of law under s 299 of the RMA against the decision of the Environment Court which confirmed (in part) the decision of the Hamilton City

Council, the respondent, on submissions made on its proposed district plan.

C Whata and *M Baskett* for Westfield (New Zealand) Ltd
D Allan for Kiwi Property Management Ltd
S Menzies for Wengate Holdings Ltd
P Lang for the Hamilton City Council
D R Clay for National Trading Co Ltd
J Milne for Tainui Developments Ltd

FISHER J.

Introduction

[1] Most of Hamilton's retail activities are conducted in either the commercial centre or five smaller centres in the suburbs. The Hamilton City Council's proposed district plan provides for additional retail activity in the commercial services and industrial zones. The present appeals are directed to the additional retail activity proposed. The appeals are brought against a decision of the Environment Court of 27 March 2003 (A 45/03) upholding those aspects of the proposed plan.

Factual background

[2] Resource management in the city of Hamilton is currently governed by transitional and proposed district plans. The proposed district plan was notified in October 1999 and amended by council decisions in October 2001. It was then the subject of further council decisions of 29 January 2002. From the proposed plan as amended, the appellants took references to the Environment Court. With minor qualifications the Environment Court endorsed the proposed plan as amended. From the Environment Court decision the appellants have appealed to this Court alleging legal error on the Environment Court's part.

[3] Under the proposed plan, retailing is contemplated in four zones– central city, suburban centre, commercial services and industrial. Retailing is also possible in new growth areas. In contention in the present appeals are the commercial services and industrial zones.

[4] Commercial services zones are found on the fringe of the central city and in several locations elsewhere. Retailing there is intended to involve primarily vehicle-orientated activities including large-format shops, traffic-orientated services and outdoor retailing. With minor exceptions the zone restricts retailing to a gross leasable floor area of not less than 400 m^2. Any retail activity with an individual occupancy less than 400 m^2 is a controlled activity where it is part of an integrated development with a gross floor area greater than 5000 m^2 and where any occupancy of less than 400 m^2 faces onto an internal pedestrian or parking area and not onto a road. Any retail activity that generates traffic over a certain threshold becomes a controlled activity. The significance of designating a retail activity a controlled activity is that it provides the council with the power to impose conditions upon retail use of the land even though not permitting outright prohibition of such activity.

[5] In an industrial zone retail activities are restricted to a gross leasable floor area of less than 150 m^2 or greater than 1000 m^2, one retail

activity per site, and a minimum net site area of 1000 m^2. As with the commercial services zone, traffic consequences are controlled by making retail activities that generate traffic over a certain threshold controlled activities.

[6] Kiwi Property Management Ltd ("Kiwi") and Westfield (New Zealand) Ltd ("Westfield") argue that provision for retail activity in the commercial services and industrial zones ought to be curtailed in order to protect the viability of existing shopping centres in the city centre and Chartwell areas. They further argue that unrestricted retail activity in those zones would have adverse traffic effects. A particular focus was that in those zones, intensive retail shopping malls should be "discretionary activities", not "controlled activities".

Legislative background

[7] Section 74 of the Resource Management Act 1991 required the Hamilton City Council to prepare a district plan in accordance with ss 31 and 32 and Part II of the Act. Section 31 prescribes the council's functions in giving effect to the Act in the district plan. The functions include two of particular significance (all statutory references as they stood prior to an amendment in 2003):

> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
> (b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances.

[8] Of the provisions contained in Part II, s 5 needs to be quoted in full:

> **5. Purpose** — (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while —
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[9] Finally, s 32 (1) sets out the council's duty in the following terms:

> **32. Duties to consider alternatives, assess benefits and costs, etc** — (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall —

(a) Have regard to —
  (i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
  (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
  (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) —
  (i) Is necessary in achieving the purpose of this Act; and
  (ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

Environment Court decision

[10] As mentioned, on appeal from the Hamilton City Council decisions Kiwi and Westfield argued that in commercial services and industrial zones intensive retail shopping malls should be discretionary as opposed to controlled. Two grounds were advanced. One was that such activity would have adverse effects on the transport infrastructure of Hamilton. The other was that there would be consequential redistribution effects upon existing retail activities elsewhere in the city.

[11] As to the transport infrastructure, a traffic expert called for the appellants, Mr Tuohey, considered that developments generating traffic movement beyond a certain threshold ought to be a discretionary activity in the commercial services zone. Contrary evidence was given by equivalent experts called by the council and Tainui Developments Ltd ("Tainui"). After traversing the merits of this evidence the Environment Court concluded that it preferred the latter witnesses. It considered that the potential for adverse traffic effects could be adequately controlled by making developments of this nature a controlled activity. The Court did not agree that imposing conditions adequate to control the potential for adverse traffic effects would invalidate any consent given.

[12] The second issue concerned consequential redistribution effects. The Court noted that s 74(3) precluded paying regard to trade competition per se but accepted that it could have regard to consequential social and economic effects. On the other hand, the Court considered that in the light of s 32 (1)(c) a rule or restriction could not be justified unless it was "necessary" in order to achieve the purposes of the Act.

[13] As to consequential effects, there was a similar conflict of evidence. The Court was critical of the evidence of Mr Tansley and

Mr Akehurst who predicted major adverse impacts on existing centres if new developments proceeded elsewhere. The Court preferred the contrary evidence of Messrs Donnelly, Speer, Keane and Warren. In particular, the Court found that the retail premises permitted by the proposed plan "may have some impact on trade at the existing centres but . . . the impact will not be sufficient to generate flow-on consequential effects" (para [148]). The Court accepted the evidence of Mr Speer that a "Chartwell-type development", ie an intensive retail shopping mall, in the commercial services or industrial zones was "more theoretical than real". The Court went on to say at para [150]:

> Having found that the proposed provisions as now supported by the Council are unlikely to give rise to adverse traffic or adverse consequential effects, it follows that in our view, the changes to the proposed plan as advocated for by Westfield and Kiwi and to a lesser extent Wengate, are not necessary to achieve sustainable management.

[14] On a separate issue, the Court noted that when the proposed plan had originally provided for a commercial services zone covering the Wengate Holdings Ltd ("Wengate") site it had required a buffer strip to manage reverse sensitivity. Consequent upon a council decision to rezone that area industrial, the special buffer had been deleted. In its 2002 resolutions the council agreed to support reversion to commercial services zoning for the site but made no overt reference to the buffer. A council witness before the Environment Court suggested that the buffer be reinstated. The Environment Court agreed with that suggestion and reimposed the buffer.

[15] From those decisions Kiwi, Westfield and Wengate now appeal.

Appeal principles

[16] Pursuant to s 299 of the Act, a party to proceedings before the Environment Court may appeal to the High Court only "on a point of law". The unsuccessful attempts of appellants to enlarge the jurisdiction has often been commented upon: see, for example, *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419; and *S and D McGregor v Rodney District Council* (High Court, Auckland, CIV-2003-485-1040, 24 February 2004, Harrison J) at para [1].

[17] Conventional points of law are relatively easy to identify. More complex is the relationship between law and fact. The only possible challenge to the original Court's finding as to a primary fact is that there had been no evidence to support it before the Court. The only possible challenge with respect to inferences is that on the primary facts found or accepted by the Court at first instance, the inference urged by the appellant was the only reasonably possible one. In these matters the Environment Court should be treated with special respect in its approach to matters lying within its particular areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349 at p 353. As Harrison J recently pointed out in *McGregor v Rodney District Council*, Parliament has circumscribed rights of appeal from the Environment Court for the obvious reason that the Judges of that Court

are better equipped to address the merits of their determinations on subjects within their particular sphere of expertise.

Kiwi and Westfield appeals

[18] In this Court Kiwi and Westfield allege essentially four errors of law. They submit that the Environment Court:

(a) Overestimated the legal threshold required before a restrictive rule can be justified;
(b) Failed to conduct its own overarching inquiry into adverse effects;
(c) Failed to take into account the desirability of public participation; and
(d) Misused the controlled activity status as a means of controlling adverse traffic effects.

[19] In addition Mr Allan argued that the Environment Court "failed to take into consideration when assessing the potential for flow-on consequential effects to arise . . . the full range of activities provided for under the zoning provisions being promoted by the council including in particular the potential for a more intensive retail development than large format retail (characterised . . . as a 'Chartwell-type development')". I could not regard this as a question of law, quite apart from the fact that it was open to the Court to express, as it did, agreement with the evidence that "a Chartwell type development is more theoretical than real". Other issues originally flagged by the appellants, such as failure to consider whether controlled activity status was the most appropriate means, were not pursued at the hearing in this Court.

[20] The appeal was opposed by the Hamilton City Council as respondent along with two interested parties with land potentially affected by any change to the proposed plan, Tainui and National Trading Co Ltd ("National Trading").

[21] It will be convenient to proceed through the four identified legal issues in turn.

(a) Legal threshold required before a restrictive rule is justified

[22] Before the Environment Court Mr Whata submitted that his client merely had to show, on the balance of probabilities, that the retail impacts flowing from the liberal zoning proposed *may* be of such a scale as to adversely affect the function of existing centres, and that it was for the council and other supporting parties to show that impacts sufficient to generate adverse effects would never occur or were so remote as to be fanciful or so small as to be acceptable. He submitted that it was not sufficient for the council to simply assert that, on the balance of probabilities, adverse effects were unlikely to occur.

[23] The Environment Court did not accept that submission. It held that in accordance with s 32(1)(c) the council and the Court had to be satisfied that any rule was *necessary* in order to achieve the purpose of the Act before a restriction would be justified. The Court concluded:

> [83] We are required, among other things, under section 32(1)(a)(i) of the Act to have regard to the extent to which any plan provision is necessary in achieving the purpose of the Act. In our view, therefore, we are required to consider carefully the provisions of section 5 and the relevant provisions of Part II of the Act as they apply to the circumstances of this case. We are then, in accordance with section 32(1)(c)(i) and (ii) to determine on the evidence whether the restrictive provisions proposed are:
>
> (i) necessary in achieving the purpose of the Act; and
> (ii) the most appropriate means, having regard to efficiency and effectiveness relative to other means.
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> [84] We are required to make a judgment in accordance with the wording of the statute. Whether regulatory control is necessary, will depend on the circumstances of each and every case. To impose on ourselves a rigid prescriptive rule, in addition to the statutory directions, would contain [sic] flexibility in the exercise of our judgment. What is required is a factually realistic appraisal in accordance with the Act, not to be circumscribed by unnecessary refinements.

[24] The Court described the word "necessary" as used in s 32(1) as "a relatively strong word" defined in the *Concise Oxford Dictionary* as "requiring to be done, achieved, etc; requisite; essential". It referred to statements from various authorities suggesting that the threshold is a high one:

- . . . evidence may show such a large adverse effect on people and communities that they are disabled from providing for themselves. [*Baker Boys v Christchurch City Council* [1998] NZRMA 433].
- we do accept that the decisions cited by counsel for Westfield support a general proposition that potentially high adverse effects on people and communities, or evidence of unacceptable externalities, should be taken into account in settling the provisions of district plans about new retailing activities. [*St Lukes Group Ltd v Auckland City Council* (Environment Court, Auckland A 132/01, 3 December 2001, Judge Sheppard).]
- The proposal would have "a serious and irreversible detrimental effect on the Upper Hutt CBD" which would be "gutted" with curtain rising on a "tumble weed street scene" [*Westfield (NZ) Ltd v Upper Hutt City Council* (Environment Court, Wellington W 44/01, 23 May 2001, Judge Treadwell).]

[25] In this Court the appellants submitted that in deciding whether more restrictive controls over retail activity were justified, the Environment Court had set the threshold too high. The first argument in support was that the dictionary definition of "necessary" adopted by the Environment Court set too stringent a standard. The appellants rightly pointed out by reference to authority that in s 32 "necessary" is not meant to indicate essential in any absolute sense but rather involves a value judgment. As was said by Cooke P in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at p 260 in this context, "'necessary' is a fairly strong word falling between expedient or desirable on the one hand and essential on the other".

[26] Clearly there would have been an error of law if the Environment Court had refused to consider more stringent controls over

retailing in the affected zones unless unavoidable in an absolute sense. However, I do not read the judgment as indicating that any such approach was taken. As s 5 of the Act makes clear, choosing the regime that will best secure the optimum use of land is inescapably an exercise in very broad value judgments. These range across such intangible considerations as safety, health, and the social, economic, and cultural welfare of present and future generations. On a full reading of the Environment Court's decision there could be no suggestion that it approached its task in any other way. There is not the slightest suggestion that the Court would have refused more stringent controls unless shown to be necessary in the sense that oxygen is essential for the creation of water.

[27] It is true that at one point the Court referred to the *Concise Oxford Dictionary* definition "requiring to be done, achieved, etc; requisite; essential" but in my view the matter is not to be approached by dissecting individual words or phrases in isolation from the rest of the judgment. The judgment is replete with other expressions and assessments demonstrating that the necessity for more stringent controls was approached as a matter of broad degree. The Court described the word "necessary" as merely a "relatively" strong word. It also cited passages from authorities clearly pointing to broad value judgments, for example "a large adverse effect on people" and "potentially high adverse effects". At no point does the Court's evaluation of evidence suggest that the appellants were required to show that more stringent controls were "necessary" in any absolute sense.

[28] A related submission was that the Court erred legally in its finding that "Having found that the proposed provisions as now supported by the Council are unlikely to give rise to adverse traffic or adverse consequential effects, it follows that in our view, the changes to the proposed plan as advocated for by [the appellant] are not necessary to achieve sustainable management". The appellants contended that the Court ought to have turned its mind to the possibility that, even though unlikely, the possibility of adverse traffic effects or adverse consequential effects still warranted greater control. Mr Allan pointed out that pursuant to s 75(1), a district plan is to make provision for certain matters set out in Part II of the Second Schedule to the Act. Clause 1 of Part II requires that provision be made for any matter relating to the use of land including the control of "Any actual or potential effects of any use of land . . . " (cl 1(a)).

[29] Clearly Mr Allan was right to say that potential effects are to be taken into account as well as actual effects. That is inherent in the prospective nature of a district plan. Furthermore, "effect" is defined in s 3 of the Act to include not only potential effects of high probability but "any potential effect of low probability which has a high potential impact". The Environment Court concluded that the proposed provisions were unlikely to give rise to adverse traffic or consequential effects (para [150]). Mr Allan argued that it was illogical to proceed from that conclusion to the further conclusion that the changes to the proposed plan advocated by Westfield and Kiwi were unnecessary.

[30] I agree that a conclusion that adverse effects were unlikely did not lead inexorably to the conclusion that more stringent controls were unjustified. There remained an evaluative step between the two. The Court had to decide whether the level of likelihood, necessarily a question of degree, warranted more stringent controls.

[31] Three sentences before referring to the conclusion that adverse effects were "unlikely" the Court had said at para [148]:

> We therefore find that the retail premises of the plan as now supported by Council may have some impact on trade at the existing centres but that the impact will not be sufficient to generate flow-on consequential effects.

That in turn must be read in the context of the Court's earlier recognition that pursuant to s 74(3) the Court was not to have regard to trade competition (para [72]). Consequential effects were limited to flow-on effects as a result of adverse effects on trade competition.

[32] Reading paras [148] and [150] together, therefore, it becomes clear that the Court regarded the possibility of relevant adverse effects as minimal, if not negligible. Paragraph [148] is expressed as an unqualified negative. Para [150] changes the language to "unlikely". In relation to traffic, the Court had already accepted the conclusion of Mr Bielby that the Hamilton city roading network "will be able to safely and efficiently cope with the volumes and patterns of traffic that will result from additional commercial development in North Te Rapa and in industrial areas" (paras [62] and [63]). So it was after expressing unqualified negatives in relation to both traffic and consequential effects that the Court went on to refer to such effects as "unlikely" and its conclusion that the changes advocated for by the appellants were unnecessary.

[33] On appeal there is always a temptation to pick upon each word and phrase in the judgment appealed from and subject it to microscopic examination. What really matters is the underlying reasoning. Given the time which the Court devoted to the reasons for its ultimate conclusion that there would not be adverse effects, and the different wording used elsewhere, I can attach no significance to the use of the word "unlikely" in para [150].

[34] A final point is that when predicting future events in an area as complex as urban resource management, ultimate conclusions could never be anything more than opinions. When speaking of the future, the distinction between an absolute negative and the conclusion that something is "unlikely" is somewhat arbitrary. It is difficult to exclude most future events in a theoretical sense, at least events of the kind now under consideration. Of course the appellants are entitled to argue that provision ought to be made for potential effects, particularly those which have a high potential impact. But the Court was entitled to approach the matter in robust terms by effectively concluding that adverse consequences were so unlikely that further controls were not necessary. In my view that is what it did.

[35] On the same topic the appellants criticised the way in which the Court had approached the onus of proof. Mr Allan submitted that "the issue before the Environment Court was whether *on the balance of probabilities* implementation of the Council's proposed provisions *could*

give rise to consequential effects of significance" (emphasis added). In my view there are two difficulties in this argument. One is that it is a contradiction in terms to say that the Court was required to determine "on the balance of probabilities" whether provisions "could" give rise to consequential effects. The possibility that something "could" happen is clearly a lower threshold than the probability that it will occur. The tests are mutually exclusive.

[36] But more importantly it involves a confusion between two different concepts. Doogue J referred to this in the different context of applications under s 105 in *Ngati Maru Iwi Authority v Auckland City Council* (High Court, Auckland AP 18/02, 7 June 2002). In all applications under the Resource Management Act 1991 a distinction is to be drawn between a burden of proof relating to the facts on the one hand and ultimate issues as a matter of evaluation in accordance with the law on the other.

[37] I agree with Mr Whata that in the present context the two questions are "is there a risk?" and "does it need to be controlled?". What was required of the appellants was sufficient by way of evidence or argument to make the possibility of an adverse effect a live issue. Once there was a foundation for considering that possibility, it was for the Court to determine the level of likelihood as a question of fact and then, in the light of such conclusions, whether particular provisions were justified in the plan. But I can see no indication that the Environment Court did anything else.

[38] Mr Allan further submitted that it is not a requirement for a rule to be "necessary" for the purposes of s 32(1)(c) if the rule is supportable by reference to other resource management criteria. He pointed out that pursuant to s 75(1)(d) the district plan is to state "The methods . . . to be used to implement the policies, including any rules" which he took to indicate that rules would be required whether or not the "necessary" test is satisfied. In my view the word "any" in this context envisages the possibility that there will be no rules unless the rule is necessary in terms of s 32(1)(c)(i). Similarly, I accept that in making a rule a territorial authority is required by s 76(3) to have regard to actual or potential effects and that rules may provide for permitted activities as well as other forms of activities. But I do not take it from those provisions that all activities are prohibited unless a rule can be found to justify them. In our country citizens are free to do whatever they like so long as there is no law prohibiting it. Rules in district plans are no different in that respect. That is the reason for the principle established in s 32(1)(c)(i) that there is to be no rule unless it is *necessary* in achieving the purpose of the Act. Long may it continue.

(b) Failure to conduct own inquiry

[39] The appellants submitted that the Environment Court erred in considering only the question whether more restrictive rules were "necessary" for the purposes of s 32(1)(c)(i). In their submission the Court ought to have gone on to have regard to all the other factors adverted to in s 32(1)(a) and, for this purpose, to carry out the evaluation required under s 32(1)(b).

[40] I agree that in accordance with its duties under ss 32 and 76 the Court was required to conduct a broadly based survey of considerations relevant to the proposed retailing activities. It is also true that hearings in the Environment Court are rehearings conducted de novo. However the Court does not have to ignore the fact that council officers and the council had already covered the same ground. The evidence the council broadly conveyed to the Court regarding the council's own investigations and conclusions with respect to a proposed plan itself represents fresh evidence before the Environment Court. The Court is entitled to rely upon that evidence in the absence of specific issues to which their attention is drawn. The Court is not expected to conduct the type of broad-ranging inquiry that would have been appropriate if the whole exercise were approached afresh.

(c) Failure to consider desirability of public participation

[41] Mr Whata submitted that the ability of competitors to oppose development by means of contesting applications for resource consent was a relevant factor for the purposes of s 32(1)(c)(ii) and that this had been overlooked by the Environment Court. By allowing the extended retail activities as a controlled activity the council was denying other members of the public the opportunity to participate. Others could have mounted an opposition if such activities had been made discretionary and therefore subject to public notification.

[42] The Environment Court had itself observed at para [152]) that the proposed plan would enable retail development unrestrained from the ability of competitors to oppose by contesting applications for resource consent. The Court pointed out that by this means the considerable delay and expense to which parties and the council would be involved could be avoided. The Court considered that a factor which fell within s 32(1)(c)(ii).

[43] Mr Whata contrasted this with the view expressed in the High Court in *North Holdings Ltd v Rodney District Council* (High Court, Auckland CIV-2002-404-002402 M1260-PL02, 11 September 2003, Venning J) at paras [25], [35] and [36] that in general the resource management process is to be public and participatory and that at least in the case before Venning J, the public interest in achieving sound resource management decisions was of greater importance than the prompt processing of applications.

[44] I respectfully agree that as a matter of general policy the resource management process is intended to be public and participatory. I see no reason to question the priority which that consideration was given over expedition in the *North Holdings* case. Of course, principles of this nature involve a value judgment to be exercised in relation to the content of each district plan in each case. Otherwise there would never be permitted or controlled activities in district plans.

[45] In the present case the council and the Environment Court considered that making intensive retail activity a controlled activity in the zones in question strikes the right balance between public participation and other resource management values. That was clearly a judgment for the council and Environment Court to make. In my view it does not

involve any point of law. The Environment Court did not ignore the many competing considerations which impact upon a decision of this nature. In para [152] the Court pointed to:

> extensive consultation and the commissioning of reports, both from Council officers and consultants. Following that process, the Council considered that to impose restrictions was not necessary for the control of consequential effects. It would have instead had the effect of inhibiting trade competition. The plan provisions as now espoused by Council enable retail development within the city of Hamilton unrestrained from the ability of competitors to oppose development by means of contesting applications for resource consents. A practice, the evidence showed, that in the past caused considerable delays, at expense not only to the parties involved, but also to Council.

[46] Clearly the Environment Court has considered the issue of public opposition. In this case it preferred the equally valid and competing consideration that the rule should be the most appropriate means of exercising the rule-making function having regard to its efficiency and effectiveness relative to other means (s 32(1)(c)(ii)). That was a choice the Court was entitled to make.

(d) Misuse of controlled activity status as the means of controlling adverse traffic effects

[47] The fourth ground of appeal to this Court was that the power to impose conditions pursuant to the classification of retail activities as controlled activities was not a valid means of avoiding adverse traffic effects in that the conditions which would need to be imposed would nullify the consents ostensibly given. The argument rests on the assumption that the conditions would be either so onerous as to remove the substance of the consent or would be dependent upon the activities of third parties over whom the applicant for consent would have no control.

[48] The performance outcomes for the relevant activities are set out in rule 4.4.5(c) of the proposed district plan in relation to commercial services zones and rule 4.5.5(c) in relation to industrial zones. In both cases the council can impose conditions when consenting to a controlled activity. The conditions can relate to traffic requirements within the applicant's immediate control in that they relate to car parking, access to and from the adjacent road network, access to major arterial roads and internal vehicular layout. But equally the rules provide for the conditions to relate to the impact upon the external roading network with respect to access, traffic volumes and traffic capacity (see traffic engineering study required under rules 4.4.3(e) or (f) and 4.5.3(f) or (g)).

[49] Rules 4.4.3(f) and 4.5.3(g) also provide that where any activity requires preparation of a traffic impact study the provisions of rule 6.4.5 relating to roading contributions is to apply. Rule 6.4.5(a)(iii) provides that in exercising any discretion available under rule 6.1.4(e) (no doubt intending to refer to (d), the council may require the provision of new roads, the upgrading of existing roads, or the payment of a levy as a condition. Rule 6.1.4(d)(ii) authorises the imposition of such conditions in

a number of circumstances including a commercial development where the value of the work exceeds $250,000.

[50] A distinctive characteristic of a controlled activity is, of course, that the council may not decline consent to a proposed activity; it can merely impose appropriate conditions. The appellant's argument is that the control necessary to avoid unacceptable adverse traffic effects requires that the council be given powers which extend beyond the mere imposition of conditions upon a consent that must be given.

[51] The Environment Court dealt with this issue in the following way:

> [64] It was suggested by some counsel that consent conditions imposed under controlled activity status may well, from a legal point of view, negate the consent and accordingly be illegal. In particular, counsel for Kiwi and Wengate submitted that some conditions, which might otherwise be thought desirable and necessary, might not be able to be imposed on a controlled activity because to do so, would result in an applicant being required to carry out work of such a scale that the consent could not be realistically exercised.
> [65] It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not "negated", or rendered "impracticable" or "frustrated", merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper's submission that such may be the price which an appellant has to pay for implementing a resource consent in certain circumstances.
> [66] It was further argued, that any condition arising out of the controlled activity status on traffic matters, may well require a third party, such as Transit New Zealand, to be involved. This may well be so. However we do not consider a condition precedent to any retail activity commencing, and involving a third party such as Transit New Zealand Limited to be invalid.
> [67] Counsel also raised the issue, of the ability of the Council to impose conditions on one developer effectively to take account of cumulative traffic effects arising from a series of developments. However, in our view, this does not give rise to any legal difficulty either. Any developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. A developer will be required to ensure that the traffic impacts of the proposed development are able to be appropriately accommodated by the roading network. Both Mr Bielby and Mr Winter were satisfied that the roading network, given the provisions in the proposed plan as espoused by the Council's latest position, could adequately cope with future development.
> [68] As pointed out by Mr Cooper the concerns raised by Kiwi and Westfield on traffic issues would be met by making retailing activities, restricted discretionary activities, with the matters over which the Council's discretion is reserved being restricted to traffic related matters. However, having regard to the evidence of Mr Bielby, and Mr Winter, which we prefer to the evidence of Mr Tuohey, and where it conflicts, with Mr Harries' testimony, we do not consider it necessary to amend the provisions to restricted discretionary activity status.

[52] As a preliminary point Mr Allan argued that although the rules clearly provided for conditions relating to internal features of the development site, it was not clear that the council would have the power to impose conditions relating to impact on traffic flows exterior to the

appellants's site. Mr Allan submitted that although the exterior matters were clearly included in the "traffic impact study" required in such circumstances, it did not follow that the council had the power to impose conditions relating to such matters. I accept the response of Mr Lang and Mr Milne that the rules do contain the power to impose positive conditions arising out of the needs demonstrated in the traffic impact study. By virtue of the power to require "roading contributions" in terms of rule 6.4.5, the council gains access to the incidental powers to require the provision of new roads, or the upgrading of existing roads, as alternatives to the payment of levies simpliciter.

[53] The appellants' principal argument, however, was that any conditions imposed in that respect would or might be legally invalid since the appellants would be powerless to bring about the requisite changes in roads on property beyond their own control. This lack of power was said to "negate the consent". The appellants further pointed out that the approval of the roading authorities, whether the council or Transit New Zealand, would place compliance with the condition beyond the control of the appellants.

[54] I agree that the power to impose conditions for resource management consent is not unfettered. The conditions must be for a resource management purpose, relate to the development in question, and not be so unreasonable that Parliament could not have had them within contemplation: see, for example, *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 and *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

[55] Conditions attached to a consent will usually be regarded as unreasonable if incapable of performance. A classic example was consent to erect additional dwellings subject to a condition requiring access via a 4.8 m wide strip when access to the applicant's property was in fact possible only through an existing strip with a width of only 3.7 m: *Residential Management Ltd v Papatoetoe City Council* (Planning Tribunal, Auckland A 62/86, 29 July 1986, Judge Sheppard); and see further *Ravensdown Growing Media Ltd v Southland Regional Council* (Environment Court, Christchurch C 194/00, 5 December 2000, Judge Smith).

[56] On the other hand, a condition precedent which defers the opportunity for the applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer: *Grampian Regional Council v City of Aberdeen* (1983) P & CR 633 at 636 (HL).

[57] In the present case the Appellants' main argument appears to be that the district plan contains invalid or unacceptable rules in that adverse traffic effects could be addressed only by imposing invalid conditions. Mr Allan submitted that "the Court has conflated the general validity of the content of a resource consent condition and whether or not, in the context of a particular proposal, that condition practically negates the

consent, is impractical to fulfil, or frustrates the consent". Mr Whata acknowledged that, as in the case of *Grampian Regional Council*, "it may be appropriate to impose a condition that requirps significant works to be undertaken prior to the commencement of the consented activity" but went on to submit that "This is no more than a statement about the validity of conditions precedent to carrying out an activity . . . it is quite another matter to adopt as a method in a district plan, control of all traffic effects by a way of controlled activity status and the imposition of conditions precedent that may blight an otherwise legitimate development".

[58] Wherever there is power to impose conditions there must be the potential for the territorial authority in question to impose invalid conditions. In the normal course any challenge to the conditions must await the specific case in question. It would normally be premature to challenge the district plan itself on the basis that the imposition of invalid conditions under it can be foreseen as a possibility.

[59] Of course it would be different if it could be postulated that consents could not be given to certain permitted activities without the imposition of invalid conditions. But I can see no reason for assuming that, faced with the need for changes to roads which lay beyond the immediate ownership and control of the appellants, it would be impossible for the Hamilton City Council to frame valid conditions in order to meet the need. In principle, for example, it would be possible to impose a condition similar to that imposed in *Grampian*, namely that until a nearby arterial route was increased in size from two lanes to four a proposed retail development could not proceed. Further, pursuant to rule 6.4.5 such condition precedent could be coupled with a levy requiring the appellants to contribute to the off-site roading development.

[60] Technically, it has been held that there is a critical distinction between two ways in which a condition is framed. One requires an applicant to bring about a result which is not within the applicant's power, for example that the applicant construct a new roundabout on a nearby roadway when the roadway is controlled by Transit New Zealand. The other stipulates that a development should not proceed until an event has occurred, in this example that the roundabout has been constructed– see *Grampian* at p 636. While I have no respect for English formalism of this type, it seems clear that at least by wording the condition in appropriate terms the council will have the power to impose valid conditions of the kind in question in this case.

[61] Mr Allan went on to submit that whether the potential for adverse traffic effects could be met by an appropriate condition, with the associated possibility that the further work or contribution required might make the development too expensive, would be a matter of fact and degree to be determined in each particular case. He submitted:

> It will be in part a function of the relationship between the scale of the work and expense required by a condition and the scale and nature of the activity for which consent has been sought. An activity which is of a relatively modest scale but which involves the generation of additional (cumulative) traffic effects that, given the traffic conditions at the time, require significant

works on the roading network, may in practice be rendered uneconomic by those works and effectively be rendered incapable of being carried out.

[62] I would not have thought that the imposition of a condition that would make a development uneconomic could normally qualify as incapable of performance for invalidity purposes. But even if that were so, the invalidity would attach to the particular condition in question, not to the district plan itself. It cannot be postulated that merely because a power could be used in an invalid manner, creation of the power itself is invalid.

[63] The last argument was developed by both Mr Allan and Mr Whata in relation to the hapless small developer who finds that, due to large developments which have already used up the remaining capacity of the surrounding roading network, the small developer's proposal requires a roading upgrade which is beyond the economic capacity of the smaller developer. Mr Whata coupled that with the need for opportunity for public opposition to the developments that had preceded it.

[64] I agree with the Environment Court that a developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. This applies to developments and activities in many contexts other than traffic effects. I can see its relevance as an argument in support of public notification as one of the relevant values. But it could not be elevated to the notion that any condition required at any given time in relation to any particular development might be invalid simply because the developer in question happens to take adverse traffic effects over a threshold beyond which an expensive upgrade is required.

[65] I have already referred to the opportunity for public participation as merely a number of the competing values which impact upon the way in which the district plan was drafted. The choice between those competing values was eminently one for the Environment Court. Similarly the question whether controlled activity status for retail activities of this sort was the best way of addressing the potential for adverse traffic effects is not a question of law. It was a resource management question for the Environment Court alone.

[66] My conclusion is that the fourth and final argument on the appeals by Kiwi and Westfield fails.

The Wengate appeal

[67] The Wengate site was zoned commercial services under the proposed plan as originally notified. In rule 4.4.3 (g) the plan provided for a special buffer zone between buildings on the Wengate site and adjacent industrial properties. The buffer was imposed to manage reverse sensitivity which might otherwise have impacted upon the Wengate site.

[68] When the Wengate site was rezoned industrial by the council decision of October 2001, the special buffer zone relating to the Wengate site was deleted. In its subsequent 2002 decision the council agreed to support reversion to the original commiercial services zoning for the Wengate site but without overt reference to the associated buffer zone. The Environment Court reinstated the buffer zone. It did so on evidence from the council which the Court described in the following terms:

> [160] Mr Harkness also pointed out that the proposed plan as notified contained rule 4.4.3(g)– Special Buffer– Te Kowhai– to manage reverse sensitivity concerns for the Wengate site. This rule was deleted by Council when the site was to be zoned as Industrial. He suggested it be reinstated– a suggestion we agree with.

[69] On appeal to this Court, Mr Menzies submitted for Wengate that the Environment Court lacked the jurisdiction to reinstate the buffer zone. He submitted that the question of a buffer zone was not the subject of any reference before the Environment Court, and that to rule on an issue not referred to the Environment Court was an error of law.

[70] Mr Menzies pointed to a number of decisions in which the Environment Court accepted that it could not make changes to a plan where those changes were outside the scope of the reference to it and could not fit within the criteria in ss 292 and 293 of the Act. They included *Applefields Ltd v Christchurch City Council* [2003] NZRMA 1; *Williams and Purvis v Dunedin City Council* (Environment Court, Christchurch C22/02, 21 February 2002, Judge Smith); *Re an application by Northland Regional Council* (Environment Court, Auckland A 12/99, 10 February 1999, Judge Sheppard); and *Re Vivid Holdings Ltd* [1999] NZRMA 467.

[71] Wengate's challenge to the Environment Court imposition of the buffer zone is based solely upon lack of jurisdiction. Mr Menzies submitted that the Environment Court was limited in its jurisdiction to the specific references before the Environment Court. The only reference before the Environment Court relevantly touching upon the Wengate land was the reference emanating from Wengate itself. Before the Environment Court Wengate merely sought the endorsement of the council's latest position that the commercial services zone should extend to the Wengate site. It did not ask that in confirming a commercial services zoning for the Wengate site the Environment Court should reinstate the original buffer zone. Mr Menzies submitted that since the Environment Court's jurisdiction was limited to the matters specifically brought before it, the Court had acted beyond its jurisdiction. He submitted that this constituted an appealable error of law.

[72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss 292 and 293 of the Act: see *Applefields*, *Williams* and *Purvis*, and *Vivid*.

[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.

[75] In the present case, it is reasonable to infer that the buffer zone was originally introduced to address environmental effects between industrial zone land and commercial services zone land. That was relevant at a time when the Wengate site, with a commercial services zoning, was across the road from industrially zoned land. The concept of a buffer zone to address interactions between industrial and commercial services zones became redundant when the zoning of the Wengate site was changed to industrial. This changed back again, however, when Wengate successfully pursued a reversion to commercial services zoning. It is unsurprising that on accepting the Wengate position that its land should have the commercial services zoning reinstated, the Environment Court would reinstate the buffer zone that had originally been associated with that form of zoning.

[76] I cannot see that it was not reasonably foreseeable that in reinstating the original commercial services zoning the Environment Court would also reinstate the buffer zone that had been associated with it. It would be odd if an appellant could gain the zoning it sought without the restrictions which one would naturally tend to associate with zoning of that nature. As Mr Lang pointed out, Wengate's reference might have sought to omit not only rule 4.4.3(g), which imposed a buffer zone, but other rules governing activities within the commercial services zone. Taken to its logical extreme, if Wengate's argument regarding the jurisdictional limitations stemming from the scope of the reference were correct, the jurisdiction of the Environment Court would have been limited to reinstatement of the zoning without any of those associated rules.

[77] In my view the Environment Court must be taken to have had the jurisdiction to agree to the requested zoning subject to imposition of other rules foreseeably associated with such zoning. A buffer zone was in that category. It follows that the Environment Court had jurisdiction to reinstate the buffer zone.

[78] The point of law brought before this Court by Wengate was limited to the question whether the Environment Court erred in law in its assumption of jurisdiction to reinstate rule 4.4.3(g) relating to the buffer zone. I have already decided that question against Wengate. However, I note in passing that the only evidence before the Environment Court on that subject was that of Mr Harkness. The dimensions of the buffer zone suggested in his evidence were more modest than those imposed. He suggested that 5 m may well have been sufficient for the width of the buffer zone as distinct from the 10 m specified in the original buffer zone and reinstated by the Environment Court. Further discussion between Wengate and the council may result in some voluntary modification of the dimensions involved but it is clearly outside the scope of this appeal.

Result

[79] All appeals are dismissed.

[80] It was agreed by counsel at the hearing that costs would follow the event on a scale 2B basis. It follows that the three appellants,

Westfield, Kiwi and Wengate, must pay costs to the respondent, the Hamilton City Council, according to scale 2B.

[81] No oral submissions were made with respect to the costs liability of the appellants to Tainui and National Trading. I would hope that these could be resolved by agreement. If necessary they will need to be the subject of written memoranda and a ruling by another Judge. To deal with that eventuality, and also any disagreement between the appellants and the respondent as to costs details, I direct that: (a) within three weeks of the delivery of this judgment all parties claiming costs must file and serve memoranda setting out the terms of their claims; (b) the appellants will have a further two weeks within which to file memoranda in opposition; and (c) the claimants will have a further ten days within which to file any memoranda in reply.