[2003] ELHNZ 79
High Court, Christchurch

Clearwater Resort Ltd v Christchurch City Council

AP34/02
AP35/02
Decision: 14 March 2003
William Young J

HEADNOTE

High court — District plan proposed — Noise — Airfield — Reverse sensitivity — Appeal validity — Submission

High Court judgment on an appeal arising from Decision C094/02 (7 NZED 724). A determination was required on the availability to Clearwater Resort Ltd and Canterbury Golf International ("Clearwater") of certain arguments they wish to run in the Environment Court on their reference in respect of Variation 52 to the Proposed District Plan.

Policies associated with the protection of Christchurch International Airport ("CIAL") have been referenced to noise contours in the Proposed District Plan. Under the Proposed Plan as notified, the 65 dBA Ldn, 55 dBA Ldn and 50 dBA Ldn noise contours are depicted on the planning maps. Rules require insulation in residential units built between the 50 and 55 dBA Ldn noise contours. Within the 65 dBA noise contour, residential units are a prohibited activity.

Following decisions on submissions ("the pre-Variation 52 Proposed Plan") the prohibition on residential units was extended to land within a composite 65 dBA Ldn/SEL 95 dBA air noise boundary. That rendered redundant the 65 dBA Ldn noise contour which was no longer depicted on the planning maps. The insulation requirement between 50 and 55 dBA Ldn contours was removed and insulation was instead required only between the 55 dBA Ldn noise contour and the air noise boundary. The 50 dBA Ldn noise contour was referred to only in Policy 6.3.9 (which dealt generally with urban extensions), not in Policy 6.3.7 (which focussed directly on airport operations). That led the Council to promulgate Variation 52.

Decisions on submissions on the Variation upheld the new Policy 6.3.7 although amendments were proposed to the explanation and reasons.

By its reference Clearwater wishes to challenge the accuracy of the lines on the planning maps which purport to identify the composite 65 dBA Ldn/SEL 95 dBA, 55 dBA Ldn and 50 dBA Ldn noise contours. The fundamental argument which it wishes to advance is that a policy of discouraging new residential development and other noise sensitive activities is not appropriate for the 50 dBA Ldn noise contours and should apply only in relation to the 55 dBA Ldn contour. Whether that argument is available may turn on the extent to which Variation 52 merely makes explicit what was previously implicit. However, as no party sought a ruling from the High Court on that, that issue was put to one side.

1. THE APPROACH OF THE ENVIRONMENT COURT IN THE DECISION UNDER APPEAL

The Environment Court had concluded that:

(a) It is open to Clearwater to assert that the planning maps do not depict the relevant noise contours accurately; this in support of its contention that the contours as depicted do not provide an appropriate basis for the implementation of the policy enunciated in the new Policy 6.3.7.

(b) It is not open to Clearwater to seek to have the relevant noise contours redrawn on the planning maps.

2. THE APPEALS TO THE HIGH COURT

CIAL and the Regional Council have appealed against the first of those conclusions; and Clearwater against the second.

3. THE EXTENT TO WHICH CHALLENGES TO THE LOCATIONS OF THE LINES WERE MADE IN CLEARWATER'S SUBMISSION

The locations of the composite 65 dBA Ldn/SEL 95 dBA and the 55 dBA Ldn noise contour lines were challenged but the Court found that there was no challenge to the location of the 50 dBA Ldn noise contour line.

4. WHETHER CHALLENGES TO THE LOCATION OF THE NOISE CONTOUR LINES ARE "ON" VARIATION 52

(a) The test for determining whether a submission is "on" a variation

The Court did not accept that "on" should be treated as meaning "in connection with". It would be difficult for a local authority to introduce a variation to a proposed plan without necessarily opening up for re-litigation aspects of the Plan which had previously been past the point of challenge. [para 65]

A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo. [para 66] Such an approach is in conformity with the scheme of the RMA which contemplates a progressive and orderly resolution of issues associated with the development of proposed plans. [para 68]

But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that is a powerful consideration against any argument that the submission is truly "on" the variation. [para 66] This approach is consistent with HALSWATER HOLDINGS Ltd v SELWYN DISTRICT COUNCIL.

(b) The 50 dBA noise contour line

For the purposes of this section of its judgment, the Court assumed that the location of the line was challenged in the submission and addressed the question whether that notional challenge is "on" Variation 52.

If the effect of Variation 52 was to treat the 50 dBA Ldn noise contour line as being definitive when it had previously only been indicative, a challenge to its location would be "on" Variation 52.

However, the reference to the 50 dBA Ldn noise contour in the Proposed Plan both as notified and in its pre-Variation 52 form had to be taken as referring to the area defined as such on the planning maps.

Accordingly, the Court would not see the explicit provision in the new Variation 52 to the effect that the noise contour lines are definitive as amounting to an alteration to the position as it was under the pre-Variation 52 Proposed Plan. So, the statement in Variation 52 to the effect that the 50 dBA Ldn noise contour line is the reference point for a new policy does not, in itself, have the consequence that a challenge to the location of the line is "on" Variation 52.

On the other hand it is arguable that the 50 dBA Ldn noise contour line has a function under Variation 52 which differs appreciably from that under the pre-Variation 52 Proposed Plan. The 50 dBA Ldn contour line is now intended to be the limit of new residential development. It is arguable that the discouragement of residential development within the 50 dBA Ldn contour is firmer than previously.

The class of people who could be expected to challenge the line's location under the 1995 version of the Proposed Plan is likely to be different from those who could be expected to challenge its location in light of Variation 52 and the different significance

attached to the lines in the two Plans. That was sufficient to warrant the conclusion that the challenge to the location of the line is fairly "on" the variation.

If the location of the 50 dBA Ldn noise contour had been "referred to" in Clearwater's submission and challenge, the Court would have held that that challenge was "on" Variation 52, subject to the proviso that it would still have been open to Clearwater to maintain in the Environment Court its general argument that Variation 52 merely makes explicit what was previously implicit in the pre-Variation 52 Proposed Plan.

(c) The 55 dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours

The location of the lines depicting those contours was challenged explicitly in Clearwater's submission. Accordingly, the only question for determination in respect of those lines is whether those challenges are "on" Variation 52.

The contour lines serve the same function under Variation 52 as they do in the pre-Variation Proposed Plan. The challenge to their location is not "on" Variation 52 and may not be persisted with in the Environment Court.

5. DISPOSITION

Clearwater's appeal was dismissed. The appeal by CIAL and the Regional Council was allowed.

CIAL and the Regional and City Councils were entitled to costs on a 2B basis.

JK Guthrie and *PD Horgan* for Clearwater Resort Ltd
JG Hardie for Christchurch City Council
JM Appleyard for Christchurch International Airport Ltd and Canterbury Regional Council

Alternative Titles
Alt cit Christchurch International Airport Ltd v Clearwater Resort Ltd

Party Names
CANTERBURY GOLF INTERNATIONAL LTD, CANTERBURY REGIONAL COUNCIL, CHRISTCHURCH CITY COUNCIL, CHRISTCHURCH INTERNATIONALAIRPORT LTD, CLEARWATER RESORT LTD

Judgment

RESERVED JUDGMENT OF WILLIAM YOUNG J

William Young J

Introduction
[1] These appeals from a judgment of the Environment Court require me to determine the availability to Clearwater Resort Ltd and Canterbury Golf International Ltd of certain arguments which they wish to run in the Environment Court on their reference to that Court in respect of Variation 52 to the Christchurch City Council's proposed plan.

[2] I originally heard these appeals on 11 December last year. In the course of preparing this judgment, I reached a view that I needed some further clarification on some of the issues presented by the case and therefore convened a further hearing on 6 March.

The planning background
[3] For many years, the City Council has set out to limit residential and other noise sensitive development in the vicinity of Christchurch International Airport. The purpose has been to avoid or limit noise complaints associated with aircraft

movements. Such complaints would put pressure on the operations of the airport. Christchurch International Airport Ltd ("CIAL"), which operates the airport, naturally wishes to limit, as far as possible, the potential for such complaints.

[4] The City Council's proposed plan was notified in 1995. The proposed plan has evolved over time and so has the detail of the policies associated with the protection of Christchurch International Airport. I will discuss the detail of these policies and their evolution shortly. At this point in the judgment, it is sufficient to note that these policies have been referenced to noise contours, a concept which requires some brief explanation.

[5] The 50 dBA Ldn noise contour comprises land which will receive average night and day noise levels of 50 dBA when the airport is fully developed. The 55 dBA Ldn and 65 dBA Ldn noise contours have corresponding meanings. SEL noise contours reflect single event noise levels associated with the take-off of a particular type of aircraft. So the composite 65 dBA Ldn/SEL 95 dBA noise contour consists of land which, when the airport is fully developed, is within either the 65 dBA Ldn noise contour or the SEL 95 dBA noise contour.

[6] I will shortly deal with the way in which the proposed plan has referred to noise contours in the expression and implementation of the City Council's general policy of protecting Christchurch International Airport from noise complaints. I note at this point, however, that in all versions of the proposed plan, noise contour lines apparently identifying the noise contours referred to in the various plans have been depicted on the planning maps.

The Clearwater Resort

[7] For a number of years, Clearwater Resort Ltd and Canterbury Golf International Ltd and another associated company (New Zealand Golf International Plan Ltd) have been engaged in a residential golf and hotel development in an area of land north of Johns Road and South of the Waimakiriri River. I will generally refer to all the relevant companies, without differentiation, as "Clearwater". The land Clearwater is developing is in reasonably close proximity to the airport.

[8] In the City Council's proposed plan, as notified in 1995, the land then owned by Clearwater was made the subject of a special zone Open Space 3D. This zone has origins which predate the notification of the proposed plan.

[9] Within this zone, development must occur in accordance with a development plan which is provided for in the proposed plan.

[10] Clearwater has subsequently acquired adjoining land which is rurally zoned in the proposed plan.

The legislative background

[11] Section 2, Resource Management Act 1991, defines a "variation" as meaning an:-

> "alteration by a local authority to a proposed policy statement, plan, or change under Clause 16A of the First Schedule."

A variation is itself within the definition of "proposed plan" in the same section.

[12] Clause 6 of the First Schedule provides:-

> "Any person, including the local authority in its own area, may, in the prescribed form, make a submission to the relevant local authority on a proposed policy statement or plan that is publicly notified … "

Accordingly, a person may make a submission "on" a variation.

[13] The First Schedule provides for public participation in relation to the hearing of submissions and decisions made in relation to them. In accordance with this process, submissions are to be publicly notified and further submissions may be made in support of or in opposition to the submissions made under clause 6. The relevant local authority will usually then hold a hearing (under clause 8B, First Schedule). It will then makes its decisions as to whether to accept or reject submissions.

[14] Clause 10(2) and (3) of the First Schedule provides:-

> "(2) The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.
> (3) The local authority shall give public notice of the fact that it has made its decisions, and the proposed policy statement or proposed policy plan shall be deemed to have been amended in accordance with those decisions from the date of notice."

[15] Clause 14 of the First Schedule provides:-

> "14. Reference Of Decision On Submissions And Requirements To The Environment Court
>
> (1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court—
> (a) Any provision included in the proposed policy statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or
> (b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan,—
> if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan."

[16] Clause 15 provides:-

> "15. Hearing By The Environment Court
>
> (1) The Environment Court shall hold a public hearing into any provision or matter referred to it.
> (2) Where the Court holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Court may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it."

History

General

[17] There is a lengthy history to planning controls associated with Christchurch International Airport. For present purposes, however, it is sufficient to start with the position as it was under the proposed Christchurch City Plan as notified in 1995.

Proposed plan as notified in 1995

[18] In the proposed plan as notified, the 65 dBA Ldn, 55 dBA Ldn and 50 dBA Ldn noise contours were depicted on the planning maps.

[19] Policy 6.3.7 was in these terms:-

> "To ensure that urban growth does not occur in a manner that could adversely affect the operations of City airports"

In the Explanation and reasons, there was this elaboration:-

> "In order to ensure the International Airport's operations can continue without undue restriction, urbanisation will be prevented where noise impacts are expected to be significant. While aircraft are expected to be quieter by the year 2000, movements are anticipated to be more frequent. As a result of projections in noise investigations, residential development will not be allowed to occur within the 65 LdN noise contour, and between the 55 and 65 LdN noise contours new residential development will be discouraged and all additions to existing dwellings will require to be insulated. Insulation against noise will be required for all new development between the 50 and 55 LdN noise contours. This policy is expected to protect both airport operations and all future residents from adverse noise impacts."

[20] Policy 6.3.9 in the plan as notified was addressed to "urban extensions". The Explanation and reasons made oblique reference to Christchurch International Airport:-

> "The policy recognises however, that not all choice can be accommodated, and there are distinct limits to growth in some sectors (eg towards the international airport)."

[21] Rules in the proposed plan as notified required insulation in residential units built between the 50 and 55 dBA Ldn noise contours. Within the 65 dBA Ldn noise contour, residential units were a prohibited activity.

[22] In this judgment I will refer to the proposed plan as notified as "the 1995 version of the proposed plan".

Plan as amended following the hearing of submissions

[23] Following the hearing of submissions, the Council amended the proposed plan in a number of respects.

[24] The prohibition on residential units was extended to land within a composite 65 dBA Ldn/SEL 95 dBA air noise boundary. This rendered redundant the 65 dBA Ldn noise contour which was no longer depicted on the planning maps. The requirement of insulation between the 50 and 55 dBA Ldn contours was removed and instead insulation was required only between the 55 dBA Ldn noise contour and the air noise boundary.

[25] Policy 6.3.9 was amended so that it relevantly read:-

> "The policy recognises however, that not all choices can be accommodated and that there are distinct limits to growth in some sectors (eg towards Christchurch International Airport and within the 50 LdN dBA noise contour)."

The amendment to Policy 6.3.9 was responsive to a submission addressed squarely to that policy. In an effort to ensure consistency with Policy 6.3.9 the City Council amended Policy 6.3.7 so that the Explanation and reasons recorded:

> "It is important that there be no extensions to urban residential zones within 50 dBA Ldn contour to avoid disturbance from aircraft noise.
>
> Between the 50 dBA LdN noise contour and the Air Noise Boundary, new urban residential development and other noise sensitive uses and development will be discouraged … ."

This amendment was not responsive to any particular submission. Accordingly, it was declared by the Environment Court to be *ultra vires*, see National Investment Trust v Christchurch City Council (unreported, decision C/89/99, judgment delivered 5 November 1999).

[26] I will refer to the proposed plan as it stood following amendments made after the hearing of submissions but allowing for the decision in the *National Investment Trust* case as "the pre-Variation 52 proposed plan".

[27] From the Council's point of view there was an incongruity between Policies 6.3.7 and 6.3.9 as expressed in the pre-Variation 52 proposed plan. The 50 dBA Ldn noise contour was referred to only in Policy 6.3.9 which dealt generally with urban extensions. It was not referred to at all in Policy 6.3.7 which was focussed directly on airport operations. It was this incongruity which was the driver for the promulgation of Variation 52.

Variation 52

[28] The salient features of policy 6.3.7 as expressed in Variation 52 are as follows:-

1. The policy itself is in these terms:-
   "To discourage urban residential development and other noise sensitive activities within the 50 dBA LdN noise contour around Christchurch International Airport."
2. The Explanation and reasons record that residential development and other noise sensitive activities are not to occur within the "Air noise Boundary" (defined by reference to the composite 65 dBA Ldn/SEL 95 dBA noise contour).
3. As well, the Explanation and reasons records:-
   "The Outer Control Boundary, [ie the 55 dBA Ldn noise contour] which is a threshold for the requirement for insulation, and the Air noise Boundary are identified on the planning maps. The 50 dBA Ldn is also shown as the point of reference for the application of Policy 6.3.7."
4. The explanation to the Variation includes the following note:-
   "The proposed Variation does *not* alter the noise contours in the Proposed Plan, nor does it change the rules relating to subdivisions and dwellings in Rural Zones with insulation requirements for residential and other noise-sensitive activities."

[29] Variation 52 attracted a number of submissions. In response, the Council appointed a Commissioner to hear and make recommendations on the submissions. These were heard in March 2001. The Commissioner reported on 5 May 2001.

[30] Clearwater was amongst the parties who made submissions. I will refer to the particular position of Clearwater shortly.

[31] For the purposes of this part of my judgment it is sufficient for me to say that:-

1. The Commissioner held that to achieve the purposes of the Act it was necessary to discourage urban residential development and other noise sensitive activities within the 50 dBA Ldn noise contour; and
2. Accordingly the Commissioner made recommendations the effect of which was to uphold the new Policy 6.3.7 as stated in Variation 52 although amendments were proposed in relation to the Explanation and reasons.

[32] The Commissioner's recommendations were accepted by the Council.

[33] It is not necessary for me to set out in detail the Explanations and reasons as proposed by the Commissioner and accepted by the City Council.

Subsequent proceedings with respect to Variation 52

[34] Clearwater has referred Variation 52 to the Environment Court.

The issues in the Environment Court on Clearwater's reference

[35] In order to understand the issues which the Environment Court must address on Clearwater's reference, it is necessary to discuss in a little detail the arguments which Clearwater wishes to advance.

[36] Clearwater sees Variation 52, both as promulgated and as amended in accordance with the Commissioner's recommendations, as inhibiting its ability to:-

1. Obtain variations to the development plan already in place in respect of the open space 3D zone;
2. Extend its development into its adjacent rurally zoned land..

[37] In its submission on Variation 52, Clearwater's principal contention was expressed in these terms:-

> "2.1 The adoption of a policy to discourage urban residential development and other noise sensitive activities within the 50 dBA Ldn noise contour around Christchurch International Airport unreasonably affects present and future development potential of Clearwater Resort Ltd and land in or adjacent to the Open Space 3D zone."

As well there were contentions that:-

> "2.3 The operations of Christchurch International Airport Limited can be satisfactorily protected … if a policy calling for insulation against noise is adopted in respect of development between the 55 and 65 dBA contours, rather than a policy of discouraging new noise sensitive developments."

and

> "2.4 The physical location of the 55 dBA Ldn noise contour and the composite 95 SEL dBA/65 dBA Ldn contour are located at too great a distance from Christchurch International Airport. Justification for the location on the planning maps for the noise contours has not been provided for during the statutory processes leading to the proposed plan as it is today and the inclusion of the contours in the plan is accordingly unlawful and *ultra vires* the Resource Management Act 1991."

[38] Amongst the decisions it sought were:-

> "3.1 In Policy 6.3.7 the adoption of the 55 dBA Ldn noise contour in substitution for the 50 dBA Ldn noise contour contained in Variation 52.
>
> …
>
> 3.5 That the planning maps be redrawn to show the correct contour locations if the contour locations on the map are shown to be incorrect.
>
> …
>
> 3.8 That the SEL 95 dBA contour line and is associated influence on land use planning be removed from the Plan."

[39] In the Environment Court, on its reference, Clearwater is confined to arguments:-

1. Associated with material in or excluded from the proposed plan which was referred to in its original submission (see First Schedule, clause 14(1)); and,
2. This only to the extent to which such arguments can be said to be "on" Variation 52 (see clause 6, First Schedule).

[40] Clearwater wishes to challenge the accuracy of the lines drawn on the planning maps which purport to identify the composite 65 dBA Ldn/SEL 95 dBA, 55 dBA Ldn and 50 dBA Ldn noise contours.

[41] The Christchurch City Council and CIAL are troubled at the prospect of a lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps.

[42] Accordingly, the Environment Court was invited to determine, as a preliminary issue, whether Clearwater could raise, on the hearing of its reference, the contention that the contour lines were inaccurately drawn.

[43] As will be apparent from what I have said, the fundamental argument which Clearwater wishes to advance on the reference is that a policy of discouraging new residential development and other noise sensitive activities is not appropriate for the 50 dBA Ldn noise contour and that such a policy should apply only in relation to the 55 dBA Ldn contour. Whether this argument is in fact available to Clearwater may, in the end, turn on the extent to which Variation 52 merely makes explicit what was previously implicit in the pre-Variation 52 proposed plan. At this point in proceedings, however, neither CIAL nor the City Council seek a ruling from me as to the availability to Clearwater of this fundamental argument. Clearwater also did not invite me to rule in a definitive way on this point. So, I put this issue on one side.

The approach of the Environment Court in the decision which is under appeal

[44] The Judgment of the Environment Court now under appeal contains a reasonably discursive review of the issues as presented by the parties and as perceived by the members of the Court.

[45] For present purposes, I can summarise the judgment fairly by saying that the Court concluded that:-

1. It is open to Clearwater to assert that the planning maps do not depict the relevant noise contours accurately; this in support of its contention that the contours as depicted do not provide an appropriate basis for the implementation of the policy enunciated in the new Policy 6.3.7.
2. It is not open to Clearwater to seek to have the relevant noise contours redrawn on the planning maps.

The appeals to this Court

[46] CIAL and the Canterbury Regional Council have appealed against the first of the two conclusions just referred to and Clearwater against the second.

Overview

[47] Challenges to the location of the lines on the planning maps representing the composite 65 dBA Ldn/SEL 95 dBA, 55 dBA and 50 dBA noise contours are only available if appropriate reference was made to them in the original submission (see clause 14(1), First Schedule) and if such challenges are indeed "on" the variation (see para [39] above).

[48] So it is sensible to consider first the extent to which challenges to the location of the lines were made in Clearwater's submission and secondly the whether challenges to the location of the noise contour lines are fairly "on" Variation 52.

[49] There is some artificiality to this process. This is because CIAL in particular, wishes to argue in the Environment Court that Variation 52 merely made explicit what was already implicit in the pre-Variation 52 proposed plan. On the basis of this argument it wishes to seek to persuade the Environment Court that Variation 52 effected no alteration in substance to the pre-Variation 52 proposed plan. If this is so, then, for reasons which I will come to shortly, it might follow that there is no scope for Clearwater to challenge Variation 52. At the hearing on 6 March, however, CIAL made it clear that it did not wish me to determine this issue on this appeal. Clearwater also did not wish me to resolve this issue. On this point, I refer back to what I said in para [43] above and note that I will revert to this point again in para [76] and [78] below.

The extent to which challenges to the locations of the lines were made in Clearwater's submission

[50] I have set out already the relevant parts of Clearwater's submissions.

[51] It is clear that the locations of the composite 65 dBA Ldn/SEL 95 dBA and the 55 dBA Ldn noise contour lines were challenged, see para [37] above.

[52] There was no specific reference to the 50 dBA Ldn noise contour in the submission. Mr Guthrie, however, pointed to the general words in the second sentence of para 2.4 (see para [37] above). As well the relief sought in para 3.5 is generally expressed. Mr Guthrie also told me that if any one of the contour lines could be shown to be wrong, this would necessarily mean that the other lines were wrong.

[53] Because I am of the view that it is not open to Clearwater to challenge the location of the 55 dBA Ldn contour and the 65 dBA Ldn/SEL 95 dBA noise contours (see below) the last of the points made by Mr Guthrie is of no particular moment. Further, and despite Mr Guthrie's submissions, I have been left with the view that the most natural reading of the submission is that the location challenge is confined to the two lines specifically identified and that general and non-specific references to the lines should be either regarded as referring back to those lines or alternatively, in the case of para 2.4, possibly to a separate ground of challenge referenced to s 32, Resource Management Act.

[54] I am therefore of the view that there is no challenge to the location of the 50 dBA Ldn noise contour line. To use the language of clause 14(l) of the First Schedule, the location of that line was "not referred to" in Clearwater's submission.

Whether challenges to the location of the noise contour lines are "on" Variation 52

General

[55] In addressing this question I will discuss the test for determining whether a submission is "on" a variation and then apply that test to the three contour lines in issue. This necessarily means that I will apply the test to the location of the 50 dBA Ldn noise contour despite the conclusion expressed in the preceding section of my judgment. I will do this to cover the contingency that it may later be held that I am wrong in concluding that the location of this noise contour line was not challenged by Clearwater in its submission on Variation 52.

The test for determining whether a submission is "on" a variation

[56] Whether a submission is "on" a variation poses a question of apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case.

[57] How should the Courts approach such a question?

[58] Obviously, such a question can only be answered by a Court as a matter of judicial assessment made in the general context of the scheme and purpose of the Resource Management Act.

[59] In the course of this dispute, three possible general approaches have been suggested:

1. A literal approach in terms of which anything which is expressed in the variation is open for challenge.
2. An approach in which "on" is treated as meaning "in connection with".
3. An approach which focuses on the extent to which the variation alters the proposed plan.

[60] Should a literal approach be taken?

[61] Such an approach was favoured by the Commissioner who heard the submissions on Variation 52 as is apparent from this passage from his report:-

> "I read Clause 6 of the First Schedule - as modified in accordance with Clause 16A - as authorising the making of submissions 'on the [Variation in the form that it has been] publicly notified … 'I therefore conclude that a submission may be made in respect to anything included in the text as notified, even if that submission relates to something that the Variation does not propose to alter. … Conversely, it is not open to submit as to seek alterations of parts of the Proposed Plan not forming part of Variation 52 as notified. An example is the submissions which sought to raise again the question of whether the noise contours ought to be shown in the Planning Maps. The Variation as notified does not include any version of those maps. I record that I made my view in this regard clear at an early stage in the hearing and that, as a result, some submitters may well have refrained from developing submissions on that issue in the way that they might otherwise have done."

[62] The approach favoured by the Commissioner would leave a good deal to the idiosyncrasies of whoever drafts a particular variation. For instance, if a particular policy in a proposed plan is supported by three reasons (reasons (a) (b) and (c)) and the intention is to supplement these reasons with a fourth (reason (d)), the person drafting the variation might either replace the existing statement of reasons and set out reasons (a), (b), (c) and (d) or simply specify that

the existing reasons are to be supplemented by reason (d). On the Commissioner's approach, the first method would open up for challenge reasons (a), (b) and (c) (given that their text had been replicated in the variation) whereas the second approach would expose only reason (d) to challenge.

[63] For the reason just given, the Commissioner's approach might be thought to open up rather too much for challenge. But in another sense, it may be too restrictive. Say a line on a proposed plan purports to identify conclusively for all purposes associated with the plan a particular height contour (say 100 metres above sea level) and this line is the basis for design controls on residential units. Assume a variation which introduces a prohibition on residential development on land which is situated 100 metres above sea level. Assume as well a landowner whose property is on the wrong side of the line but who claims that the line is drawn too low on the hillside and that his property is in fact only 95 metres above sea level. In such a case, I would have thought that the land owner (who had perhaps been very happy with the design controls inserted by the proposed plan and for this reason had not previously bothered to challenge the location of the line) could fairly challenge the positioning of the line by way of submission on the variation and this irrespective of whether the planning maps were attached to the variation as notified. This is because the variation would involve a chance of function for the contour line which would fairly open for challenge its location.

[64] Mr Guthrie's primary argument was that word “on” in the First Schedule to the Act should be construed as having a meaning akin to “in contact or connection with”. He argued that the noise contours on the planning maps were a method for the implementation of Policy 6.3.7, as enunciated in Variation 52, and that a challenge to them could fairly be regarded as being “in connection with” Variation 52.

[65] I was not much attracted to Mr Guthrie's argument that “on” should be treated as meaning “in connection with”. If so broad an approach were to be adopted it would be difficult for a local authority to introduce a variation to a proposed plan without necessarily opening up for re-litigation aspects of the plan which had previously been passed the point of challenge.

[66] On my preferred approach:-

1. A submission can only fairly be regarded as “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
2. But if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly “on” the variation.

[67] I will amplify these two considerations briefly.

[68] The first of the considerations is consistent with the arguments addressed to me by counsel for CIAL and the City Council. It is also consistent with the approach taken in the Environment Court in the judgment under appeal. Further, it seems to me to be in conformity with the scheme of the Resource Management Act which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans.

[69] The second of the considerations is consistent with the judgment of the Environment Court in Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192. It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of “left field”, there may be little or no real scope for public participation. Where this is the situation, it is appropriate

to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

The 50 dBA noise contour line

[70] It will be recalled that I am of the view that the location of this noise contour line was not challenged by Clearwater in its submission. For the purposes of this section of my judgment I will assume that the location of the line was challenged in the submission and address the question whether this notional challenge is "on" Variation 52. Obviously some of the arguments relevant to this issue are also relevant to questions associated with the other noise contour lines.

[71] There are two possible bases on which it might be argued that the challenge to the location of the 50 dBA Ldn contour is "on" the variation:-

1. Variation 52 specifically provides that the planning maps are conclusive as to the location of the relevant noise contours but this was not explicit in the policies expressed in the pre-Variation 52 proposed plan.
2. The function of the 50 dBA Ldn noise contour line is different under Variation 52 from its function under the pre-Variation 52.

[72] If the 50 dBA Ldn noise contour line depicted on the planning maps in the pre-Variation 52 proposed plan was indicative only, an alteration which made it conclusive as to location would fairly be open to challenge by submission. In other words, if the effect of Variation 52 was to treat this contour line as being definitive when it had previously only been indicative, a challenge to its location would be "on" Variation 52.

[73] I am, however, perfectly satisfied that the references in the proposed plan to the 50 dBA Ldn noise contour in the proposed plan both as notified and in its pre-Variation 52 form must be taken as referring to the area defined as such on the planning maps. There are two reasons for this conclusion:-

1. It would be a little odd if the noise contour lines depicted on the planning maps were indicative only.
2. At least one rule in the pre-Variation 52 proposed plan refers to the "50 dBA Ldn airport noise contour line" and this must be a reference to the line as depicted on the planning maps.

[74] Accordingly, I would not see the explicit provision in the new Variation 52 to the effect that the noise contour lines are definitive as amounting to an alteration to the position as it was under the pre-Variation 52 proposed plan. So, the statement in Variation 52 to the effect that the 50 dBA Ldn noise contour line is the reference point for the new policy does not, in itself, have the consequence that a challenge to the location of the line is "on" Variation 52.

[75] On the other hand it is well arguable that the 50 dBA Ldn noise contour line has a function under Variation 52 which differs appreciably from its function under the pre-Variation 52 proposed plan. The 50 dBA Ldn contour line is now intended to be the limit of new residential development (albeit with some minor exceptions). The precise definition of its role under the pre-Variation 52 proposed plan is open to debate, but it is certainly arguable that the discouragement of residential development within the 50 dBA Ldn contour is firmer under Variation 52 than it was previously.

[76] I note in passing that CIAL wishes to reserve its position as to whether Variation 52 simply makes explicit what was previously implicit. I heard a good deal of argument on this point. But at the second hearing (on 6 March) Ms Appleyard indicated that she was not seeking a ruling from me on this question. So, I will just have to deal with the appeal on the assumption that there is a change of function.

[77] Assuming (for the purpose of this appeal) that there is a change of function, does this have the result that a challenge to the location of the 50 dBA Ldn noise contour line is "on" Variation 52? The class of people who could be expected

to challenge the location of this line under the 1995 version of the proposed plan is likely to be different from the class of people who could be expected to challenge its location in light of Variation 52 and the different significance attached to the lines in the two plans. This is sufficient, on my appreciation, to warrant the conclusion that a challenge to the location of the line is fairly "on" the variation.

[78] So, if the location of the 50 dBA Ldn noise contour had been "referred to" in Clearwater's submission and challenged, I would have held that this challenge was "on" Variation 52, subject to the proviso that it would still have been open to Clearwater to maintain in the Environment Court its general argument that Variation 52 merely makes explicit was previously implicit in the pre-Variation 52 proposed plan.

The 55 dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours

[79] The location of the lines depicting these contours was challenged explicitly in Clearwater's submission. Accordingly, the only question for determination in respect of these lines is whether these challenges are "on" Variation 52.

[80] It is perfectly clear that the relevant contour lines depicted on the planning maps in the pre-Variation 52 proposed plan were intended to be definitive. I say this given the rules to which Ms Appleyard referred at the hearing on 6 March. Indeed this is rather more obvious than the corresponding position in relation to the 50 dBA Ldn contour line which does not figure so prominently in the rules in this version of the proposed plan. So the fact Variation 52 specifically references the policies enunciated to the contour lines as drawn cannot be regarded as having the consequence that a challenge to the contour lines is "on" Variation 52.

[81] At the hearing on 5 March Mr Guthrie accepted that these contour lines serve the same function under Variation 52 as they do in the pre-Variation 52 proposed plan.

[82] It follows that the challenge to their location is not "on" Variation 52 and may not be persisted with in the Environment Court on the hearing of its reference.

Other issues

[83] The arguments of counsel on all sides covered a broad range of issues, not all of which are addressed in this judgment.

[84] Because I have held that it is not open to Clearwater to challenge the locations of the various contour lines, it follows that there is no occasion for me to consider whether it would be appropriate to permit Clearwater to seek relief from the Environment Court involving the redrawing of the lines, an issue upon which I heard much argument. As well, given my conclusion that the locations of the lines are not open to challenge, I see little scope for the possible application of s 293, Resource Management Act, another topic upon which I had the benefit of much argument. Further, given my conclusions, there seems little point in me reviewing complaints as to lack of specificity in the submission made by Clearwater. Arguments associated with such complaints were advanced to me by both CIAL and the City Council.

[85] That said, I will reserve leave to the parties to revert to me in relation to any outstanding issue; this to cover the contingency that there is something material in the arguments advanced to me which I have overlooked.

Disposition

[86] Accordingly, I dismiss the appeal by Clearwater and allow the appeal by CIAL and the Canterbury Regional Council. I hold it is not open to CIAL to challenge the locations of the noise contour lines which I have mentioned.

[87] CIAL, the Canterbury Regional Council and the City Council are entitled to costs which are to be fixed by the Registrar on a 2B basis.

[88] As indicated, I reserve leave generally to the parties to revert to me.

All Citations

HC Christchurch AP34/02, 14 March 2003, [2003] ELHNZ 79, 2003 WL 1827083

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