

## **THE TRANSPORT ENGINEER'S HANDY UPDATE ON CASE LAW**

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**ABSTRACT:**

Find it hard to keep up with all of the RMA cases that might be relevant to your work as a transport engineer? Well, this is your chance for a brush up and update on recent cases which impact on your work. Whilst some may say that the cases involved people who decided not to collaborate (and therefore argued it out on Court), this case summary will be presented in the spirit of collaboration, to assist you to carry out your work in the resource management sphere with the knowledge that you are "up with the play".

## THE TRANSPORT ENGINEERS HANDY UPDATE ON CASE LAW

### INTRODUCTION

As a transport engineer, you may be familiar with preparing reports and/or evidence, under the RMA, in relation to:

- Resource consent applications;
- Regional or district plan preparation;
- Proposed plan change applications; and
- Submissions on any of the above.

Last year I delivered a paper focusing on the preparing of expert transport reports and evidence. This year I want to:

- Expand on that paper and provide you with some recent case law and decisions relating to various transportation matters.
- Provide an update to some of the case law which I referred to in my 2012 paper.
- Taking this case law into consideration, I will provide you with guidance to "keep you ahead of the game" when it comes to preparing expert transport engineering advice and evidence.

### RECENT CASELAW – TRANSPORTATION ISSUES

#### Methods to Determine Trip Generation

In the case of *Ferrymead Retail Limited v Christchurch City Council*<sup>1</sup>, the Council granted Bunnings a land use consent to establish and operate a store in Ferrymead. Nearby, Ferrymead Retail Ltd ("Mitre 10") operated a Mitre 10 Mega store. Despite Mitre 10 wanting the application to be processed on a notified basis, it was processed and granted without notification. In this case, Mitre 10 sought judicial review of the Council's decision to process on a non-notified basis and to grant the application. Two grounds that Mitre 10 relied on were:

- Processing the application without sufficient information to enable the decision to be made; and
- Granting consent in reliance on conditions that were inadequate.

One of the main issues in the application was traffic effects, in particular, estimates of traffic generated by the proposed store and two possible methods of prediction. Bunnings' application was supported by a Transport Assessment report, which predicted lower traffic generation than in a report accompanying Bunnings' prior application (which had been withdrawn). It concluded that these effects were no more than minor, and the application was processed on a non-notified basis.

Bunnings had originally used a model based on *gross floor area* and now relied on a model based on *indexed annual sales figures*. This was on the basis that the gross floor area model was not an accurate predictor of traffic generation for the Bunnings store. However, there were concerns about the indexed annual sales model used. This was because the sales data on which the

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<sup>1</sup> *Ferrymead Retail Limited v Christchurch City Council* [2012] NZHC 358.

modelling was based had not been disclosed due to commercial sensitivity, but the Council had accepted that the model conformed to best practice.

A transportation engineer produced evidence, on behalf of Mitre 10, that the traffic assessments in Bunnings' application lacked important data, had a number of errors, and was potentially an unreliable basis on which to decide whether there should be notification and approval of the application.

Evidence on behalf of Bunnings explained that the floor area model was a poor fit given the proximity of the Mitre 10 store.

Evidence from the Council's transportation consultant showed that the approach to traffic generation based on indexed annual sales was new to him, but after considering advice from an economic expert, he was satisfied that the model was robust and appropriate.

Mitre 10 argued that the Council was not entitled to take the data provided by the applicant as a "given", especially where a different methodology had been used and where this had produced a dramatic difference in the traffic generation figures (compared to the gross floor area model). As such, Mitre 10 said that the Council had inadequate information about traffic generation to make decisions about notification and granting of the consent.

Considering the traffic generation issue, Chisholm J observed that consent authorities are not under a "*rigid obligation to check all the raw data accompanying resource consent applications (such as the sales figures used in the traffic generation model in this case)*". But, whether or not raw data needs to be tested will depend on the particular application. For example, if there is some reason to doubt the integrity or reliability of the data, then further inquiry might be expected, with the nature of the inquiry being a matter of judgement for the consent authority, subject to appeal rights<sup>2</sup>.

Chisholm J held that the Council had adequate information, notwithstanding they did not have access to Bunnings sales figures, because:

- The Council had the traffic generation report referred to a transportation consultant, who also referred it to the Council's economist;
- The Council sought clarification from Bunnings' development manager on how the sales projections had been reached;
- The Council discussed matters with the Bunnings' transportation consultants;
- The Council sought legal advice about whether they could rely on unseen data, which concluded that the Council could, provided they had sufficient information;
- The transportation consultant's report was reviewed by another transportation engineer; and
- The Court said it was untenable to expect the Council to vigorously check all raw data. It would be an "*unworkable administrative burden*" and costly<sup>3</sup>.

Mitre 10 also argued that the Council was not entitled to rely on the proposed conditions and whether these conditions would actually ensure that there would be no more than minor adverse effects.

Chisholm J held that the Commissioner did not err in law by taking into account the proposed traffic conditions when considering whether the application should be notified. Following *Auckland City Council v Rodney District Council*<sup>4</sup>, the Council could take into account prospective conditions of

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<sup>2</sup> *Ferrymead Retail Limited v Christchurch City Council* [2012] NZHC 358 at [103].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Auckland City Council v Rodney District Council*<sup>4</sup> (2009) 15 ELRNZ 100 (CA).

the consent as mitigating the effects of the activity if they are inherent in the application; but not those conditions that are not. Given Bunnings' decision to incorporate the traffic conditions in its application, those principles applied.

This case demonstrates an example of the acceptance of the use of a model based on indexed annual sales figures – even where the raw data is not available. The Court's acceptance of this method depended on the checks and reviews undertaken by the Council before relying on them. There was a risk that the use of a different model, with a different outcome, would be subject to scrutiny and such a situation is not ideal. A change in methodology is a key flag that further inquiries may be required. However, in this instance, the Court was satisfied that sufficient inquiries had been carried out. The Court has also confirmed that conditions offered as a part of a resource consent application may be considered when assessing whether an application should be notified.

### Provision of Parking

The case of *Sandspit Yacht Club Marina Soc Inc v Auckland Council*<sup>5</sup> concerned a proposal by the Sandspit Yacht Club Marina Society Incorporated to establish a marina at Sandspit using the land-based facilities around the Sandspit Yacht Club. The Auckland Regional Council granted consent for works associated with water-based activities, but Commissioners of Rodney District Council refused consent for the land-based activities which included construction of a breakwater, sand deposition and earthworks to construct two new reclamations for the use of parking and boat maintenance. Local residents supported the Commissioners' decision. However, by the time of the hearing, the Auckland Council, following the amalgamation of Auckland Regional Council and Rodney District Council, supported the grant of consent.

The Court said that this would lead to over-design for parking that could impinge on other environmental considerations. Regarding possible traffic effects, the Court was of the view that peak parking demands should not be a general requirement for design. However, in this case peak traffic demand was proposed to be accommodated on site. The Court concluded that the number of vehicle parking spaces proposed would be sufficient to deal with the vehicles generated from the activities and may, in fact, be able to alleviate parking demands in the surrounding area, as the car parks could be used by the public during off-peak periods.

A key concern for the residents was that the marina site would become an enormous parking lot at peak times and they considered that this intensity of use would be a significant change that would impact on amenity. They were also concerned that more drivers would be attracted to the site, which would result in higher parking demand. As to the amenity effects of such parking activity, the Court found that mitigation planting would significantly ameliorate such effects.

This case is authority for the fact that the RMA does not require parking to be designed for peak demand. In fact this may cause other adverse environmental effects. Notwithstanding that, in this particular case, "over catering" of car parks avoided adverse parking effects.

The Court also confirmed that the calculations provided by traffic engineers were robust and compared favourably to the generation characteristics established by Austroad guidelines.

### Effect of Traffic (Noise) on Residential Amenity

*Stacey v Auckland Council* [2011] NZEnvC 109 was an appeal against a resource consent granted by Auckland Council, for a trucking company to carry out its existing activities at its transport depot, but with extended hours of operation. The consent extended the operating hours of the freighting activities to 24 hours per day, seven days per week, but did provide for reduced truck movements at night. The site was zoned Business 4, but was opposite a residentially zoned area and these residents opposed the movement of trucks during the extended hours. An expert planning witness gave evidence that it would be reasonable to limit the traffic movements to 7am to 11pm Monday to Saturday and 9am to 6pm on Sundays.

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<sup>5</sup> *Sandspit Yacht Club Marina Soc Inc v Auckland Council* [2012] NZEnvC 52.

The Court took the view that the effects, on the surrounding environment, of traffic on the road, (in this case noise effects) are effects which the Court can take into account when considering land use activities. The Court declined the consent for the extended hours of operation contained in the Council's decision.

The Court considered section 104(1)(a) of the RMA, noting the wide statutory definition of "effect". The Court accepted that the extended hours would enable the trucking company to make more efficient use of the site and more efficiently coordinate its operation with those of the Port of Auckland and the rail infrastructure. However, adverse effects included the effects of up to 1444 more truck movements per week along the street than at present. The Court considered district plan limits for noise emitted from a Business 4 zone and concluded that the actual, potential and cumulative adverse effects on the neighbouring residential environment during night hours would be serious. Further, the Court was not confident that the proposed mitigation measures would keep the disturbance below a reasonable or acceptable level. While the Court did not decline the resource consent, they did not approve the extended hours of operation. In the subsequent case of *Stacey v Auckland Council* [2011] NZEnvC 184 the Court granted the resource consent to allow for 24 hour operation of the trucking site, but limited the truck movements to or from the site to 7am to 10pm Monday to Friday and 7am to 6pm Saturday.

This case endorses consideration of traffic movements on the road, itself, including noise effects on the road. Historically, noise effects from traffic travelling along the road have carried little, or no influence, in assessments of adverse effects. Activities on a site, which give rise to traffic which has effects elsewhere, may be considered when assessing whether or not to grant consent. It is likely that this outcome was influenced by the existence of the neighbouring residential zone, and the outcome may have been different had the surrounding area been zoned as business / industrial.

## UPDATE ON 2012 CASES

At the 2012 Conference, I addressed the provision of expert evidence before Council and / or the Courts.<sup>6</sup> There have been developments with some of the cases I referred to in that paper which have an implication with regard to the preparation of expert evidence.

### Non-complying Activities

I discussed how resource consent applications for non-complying activities are assessed by the decision maker. A non-complying activity may be granted or refused, with conditions imposed; however, it must also pass the "gateway test" in section 104D in order to be granted. That is, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

- a. the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
- b. the application is for an activity that will not be contrary to the objectives and policies of—
  - i. the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
  - ii. the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
  - iii. both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

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<sup>6</sup> Amanda Douglas 'Stand Up and Deliver Expert Evidence' IPENZ Transportation Group Conference Rotorua, March 2012.

The section 104D test is a threshold test which can be addressed as either an entry or exit test. Nevertheless, one of the tests, must be met before consent may be granted.

In addition to the gateway test, considerations for a non-complying activity must turn to:

- a. all other provisions of a plan in addition to policies or objectives; and
- b. effects that are more than minimal, but less than minor.

One approach for those assessing an application is to follow the *Baker Boys*<sup>7</sup> approach and:

- a. examine all effects of the proposal (including beneficial effects);
- b. examine all relevant provisions of the plan; and then
- c. examine whether the adverse effects are more than minor; or, in the alternative
- d. whether the proposal is contrary to the objectives and policies of the plan.

Another approach is to consider the threshold test<sup>8</sup> first, however, difficulties arise<sup>9</sup> :-

- a. In identifying only effects that are more than minor, witnesses discount effects which are more than minimal but less than minor. This can have a particular impact where there are multiple or cumulative effects, each of which is not significant, but is more than minimal; and
- b. After addressing the objectives and policies of the plan, the witness forgets to return to consider all the other provisions of the plan before addressing the various criteria in Section 104(1).

There is a danger in conflating the examination of effects which are more than minor and the objectives and policies of the plan, with the discretionary criteria in Section 104(1) of the Act. This can result in the witness failing to consider effects which are more than minimal but less than minor, and provisions of the operative and proposed plans other than the policies and objectives.

In *Foster v Rodney District Council*<sup>10</sup> the Court said:-

*"Quite simply, this Court's understanding of the law is that Section 104D is a threshold or high level test which enables jurisdiction for the Court to grant consent under Section 104(1). It is fundamental that the two tests are different in that the threshold of tests under Section 104D are broad or high level filter, and do not mean that an application passing these tests should or will be granted consent under Section 104(1)."*

*Mason Heights Property Trust v Auckland Council*<sup>11</sup> affirmed the approach in *Baker Boys*<sup>12</sup> and *Foster*<sup>13</sup> in relation to approach for assessing an application for non-complying activities.

Mason Heights Property Trust appealed against the decision of the Auckland Council, formerly Rodney District Council, to decline a non-complying consent for a four-lot subdivision of 3.5 hectares of rural-zoned land on the urban edge of Warkworth. To the east of the site was a large residential development, not part of the subject site. The proposal was part of a project which sought to establish a church meeting hall on the site and subdivide the residue. Although the

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<sup>7</sup> *Baker Boys Limited v Christchurch City Council* [1998] NZRMA 433.

<sup>8</sup> See section 104D RMA

<sup>9</sup> As the Court noted in *Foster v Rodney District Council*, Env C, A123/2009, Judge Smith, at [17].

<sup>10</sup> *Ibid* at [24].

<sup>11</sup> *Mason Heights Property Trust v Auckland Council* [2011] NZEnvC 175.

<sup>12</sup> *Baker Boys Limited v Christchurch City Council* [1998] NZRMA 433.

<sup>13</sup> *Foster v Rodney District Council*, Env C, A123/2009, Judge Smith.

Council declined the subdivision on the grounds of adverse effects on rural character, caused by the introduction of a type of urban development, it allowed a boundary adjustment and creation of a separate title around an existing house, and approved the plan. The Council decision referred to the Warkworth Structure Plan, a non-statutory document which anticipated an urban zoning of the area sometime after 2024; the Council decision indicated that the Council should not be allowing premature subdivision or residential development in the area.

The Court assessed the proposal first under the criteria in section 104(1) of the RMA before considering the threshold tests in section 104D. The issues were: the effects of the proposal, whether the relief sought gave effect to the Auckland Regional Policy Statement, whether the proposal complied with the objectives and policies of the district plan and whether other matters were relevant.

The Court found that the proposal did not merit consent under section 104(1) of the RMA. Similarly, it did not pass either threshold under section 104D. The Court was satisfied that purpose of the RMA under Part 2 would be better served by refusing consent. Therefore, the appeal was declined.

The Court took the approach that:

*"Given the scope of this appeal as a non-complying activity we are guided in our assessment by Baker Boys v Christchurch City Council [1998] NZRMA 433 and Foster and E Reynolds, B Cruickshank v Rodney Council [2010] NZRMA 159. We have decided to take the approach of considering this application first on its merits under the criteria of Section 104(1) of the Act. If we conclude that we would exercise our discretion to grant consent, we would then consider the threshold tests of Section 104D(1)(b)(i) of the Act as exit thresholds, mainly whether the effects are minor OR the application is not contrary to the objectives and policies of the Plan."*<sup>14</sup>

Witnesses should not, therefore, fall into the trap of addressing only section 104D for a non-complying activity, and not addressing the remainder of the effects and/or planning documents in their evidence.

### Update on Interim Decision: Cumulative Traffic Effects

I previously discussed the case of *Laidlaw College Inc v Auckland Council*<sup>15</sup>. In that case, the Court considered the traffic effects from building a Mitre 10 Mega just off a motorway in Auckland. Two traffic witnesses undertook modelling to estimate the likely traffic that would be generated by the proposal and its effects on the local traffic network. Both reached different conclusions about the level of delay resulting from the increased traffic generated by the development and what the significance of these effects were likely to be in terms of the statutory tests. One maintained that the effect would be more than minor and could not be mitigated, but the other witness maintained the opposite. The Court considered that there were more than minor adverse traffic effects from the proposal to build a large hardware store just off the motorway, and was not convinced that additional mitigation proposed would be feasible or effective. The Court considered declining the consent, but instead issued an interim decision so that mitigation could be explored. This was due to the fact that there was a possibility that mitigation might work and there was one traffic expert who gave evidence that it would. This allowed Magsons Hardware Ltd a further opportunity to advance details of its proposed traffic mitigation with the Auckland Council and the New Zealand Transport Agency.

After the interim decision in *Laidlaw*, discussions between the parties resulted in further traffic modelling being undertaken and the parties filed a joint memorandum advising the Court that the issues had been resolved. The final decision in relation to the resource consent application for the Mitre 10 mega store was set out in *New Zealand Retail Property Group v Auckland Council* [2012] NZEnvC 240.

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<sup>14</sup> *Mason Heights Property Trust v Auckland Council* [2011] NZEnvC 175 at [18].

<sup>15</sup> *Laidlaw College Inc v Auckland Council* EnvC, [2011] NZEnvC248, 1 September 2011.

The Court considered that the proposed conditions of consent and the amendments sought reflected an appropriate outcome, and ultimately granted the consent, subject to the approved conditions.

Examples of those conditions included:

- a. Upgrading the nearby intersection to provide for an extra lane, at the consent holder's cost;
- b. Submitting a temporary traffic management plan for approval prior to the commencement of the works;
- c. Council's ability to reviews the conditions of consent, under section 128 RMA, in relation to the traffic / parking effects; and
- d. Installation of a signalised intersection to control entry to the site, at the consent holder's cost.

One of the issues for the interim decision was whether the applicant should bear the costs of improvements or mitigation where their development was effectively "the straw that broke the camel's back" and triggered improvements. Interestingly, this was the position reached after further work was done and the parties consulted on the issue.

## EXPERT ADVICE FOR EXPERTS

### Witness Independence

Your role as an expert is to help the decision maker, by providing independent evidence within your area of expertise.

One major concern is when experts stray from being independent advisers and instead become an advocate for their clients. The Court in *Envirowaste Services Limited v Auckland Council* [2011] NZEnvC 130 was concerned that the independence of an expert witness was compromised as he performed most of his work for one client. The witness had office space within the client's premises and he also drafted the client's submission in respect of the application. The Court stated that had the Court been aware of these factors, it was likely that the witness in question would not have been allowed to give evidence as an expert witness. The Court warned that should the evidence between the parties conflict, where the independence of an expert witness was in question, the Court would prefer the evidence of the expert witness for the other party.<sup>16</sup>

Keep in mind that you are an independent expert and not a hired gun. Championing your client's case may actually cause more harm than good, and may ultimately undermine your credibility as an expert witness. Remain true to yourself, even if the result is not what the client wants to hear. Also, be aware that if you carry out a significant proportion of your work for one client, your independence may be questioned.

### Detailed Reports and Realistic Mitigation

Experts should also ensure that any report / evidence they prepare is sufficiently detailed to enable a decision maker to make an informed decision. In *Blakeley Pacific Ltd v Western Bay of Plenty DC* [2011] NZEnvC 354, the Court found that the application did not provide appropriately detailed evidence. As such, the Court could not be certain as to how the proposal would meet the requirements of the RMA and the relevant planning instruments, in relation to the adverse effects identified. Consent was, therefore, refused.

*Blakely* concerned a proposal for a residential subdivision. The site was zoned rural and the proposal was a discretionary activity overall. The owners of the subdivided lots would mostly be holiday home owners. The Court considered possible effects of the proposal on ecology, visual

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<sup>16</sup> *Envirowaste Services Limited v Auckland Council* [2011] NZEnvC 130 at [131].



amenity and natural character, archaeology, natural hazards, social well-being and cultural matters. Nearly the entire site fell into the category of Acutely Threatened Land Environment NZ.

It was clear to the Court that roading would need to be maintained on the site, and new roads created. What was not so clear was whether the costs of the roading beyond the Blakeley Pacific site were to be met by the applicants, or in what proportion. The Court found there was no clear plan to prevent increased vehicular and other traffic from adversely affecting the coastal beach, which was one of the major dotterel breeding areas in the North Island. The Court also expressed concern as to how the assertions by expert witnesses, that there were no likely adverse ecological effects, was to be achieved as the conditions were neither realistic nor enforceable in a practical sense.

Whilst counsel for the applicant submitted expert evidence showing that there were no significant adverse effects, it was clear from all the evidence that there were a series of adverse effects identified, which were to be addressed in terms of a series of complex conditions and management plans. However, how some of the outcomes recommended by the experts would be achieved was not explained.

It is, therefore, important that all experts ensure any reports / evidence are detailed, clear, and that any proposed mitigation / conditions are realistic and practical.

### Differing Views of Experts

Due to the very nature of expert evidence, there will not always be agreement between different experts. This is expected, and is acceptable. A recent case where this occurred was *Playground Events Ltd v Waikato District Council* [2012] NZRMA 242; [2011] NZEnvC 149. This concerned an appeal by the applicant against the Council's refusal of resource consent for temporary events and music concerts at small ruraly zoned farm. The applicant held existing consent to operate tourist and recreation activities e.g. paintball, clay-bird shooting, quad bike tours. One issue was traffic, as the main entrance to the farm is located off State Highway 23, the main road from Hamilton to Raglan, which is a regional arterial route with a posted speed limit of 100km/h.

Two transportation engineers gave evidence about traffic effects in relation to the proposal, on behalf of the applicant and the Council. Both experts agreed that the main effects related to the large volume of traffic associated with event attendees and the potentially significant adverse impact of that traffic on the safe and efficient operation of the road networks. They also agreed that the traffic associated with the set-up and dismantling of events would be unlikely to have any significant effect, compared to the activities that would be expected in a rural area, or from the existing authorised activities.

The area of disagreement between the experts concerned their views about what might constitute effective traffic management and the level of effort that should be put into managing the risk of adverse weather or unexpected events.

The Council's expert took a more conservative and precautionary approach compared to the applicant's expert. The expert highlighted the risk of significant delays if State Highway 23 became obstructed, and potential serious crashes if traffic queues reached unsafe areas, or if there were inappropriate activities and behaviour in the road corridors. The Council's expert described these potential adverse effects as of low probability, but high potential impact if they eventuated.

The Court considered that both of the experts' evidence was realistic, precautionary and professional, responding appropriately with amendments to the proposed conditions. The Court considered the expert opinions as to traffic effects and concluded that these could be appropriately mitigated by the proposed conditions. However, the Court held that the cumulative effects on the amenity values and rural character of the surrounding area would be adverse and significant and declined the consent.

Experts all have different approaches and opinions. It doesn't matter if your evidence is different to that of another expert, as long as it is based on careful analysis and consideration. The key is to hold your professional view and maintain it. But, don't be dogmatic in that view. Be prepared to concede points where justified to maintain your professionalism and credibility.

## Importance of Addressing All Issues in Evidence

The Environment Court made comments about the preparation of evidence, in *Stirling v Christchurch City Council*<sup>17</sup>. The Environment Court case was an appeal against the decision by the Christchurch City Council to decline consent to establish retail shops in the Business 3 Zone. The applicant and the Council agreed that, in most respects, the effects of the proposal on the environment were likely to be minor. While the effects of the proposal may have been minor, the Council strongly opposed the grant of consent on the basis that it was contrary to the objectives and policies of the City Plan.

The City Plans sets out assessment matters which are to be applied when considering applications for resource consent. Separate assessment matters arise in relation to retailing within the B3 zone and also to activities that do not comply with the high traffic generation rule. The consent authority is required to have regard to these assessment matters when deciding whether to grant consent, with or without conditions. Most of the assessment matters are concerned with effects of the proposal on the environment. Others also include whether the proposal will create a precedent, or to do with the achievement of policies in the Plan.

The Court noted their concern with the evidence of a planner called by the Council<sup>18</sup>. This planner gave evidence that the proposal would have easily ticked off the assessment matters. However, the Court noted that the planner did not provide a comprehensive analysis of the assessment matters in his evidence-in-chief, and as he had said that it would have been relatively easy for these matters to gain a tick, then that evidence should have been presented. While the Court stated that the planner may have been right, that the majority of the assessment matters were indeed satisfied, there were still places where they were in tension.

Another issue in the case related to cumulative effects. The Council asked the Court to consider the cumulative effects of future activities, including potential resource consent applications. This approach is a significant departure from *Dye v Rodney District Council*, which is binding on the Environment Court. Two experts, who gave evidence on behalf of the Council, talked about cumulative effects. From the Court's point of view, it appeared as if the experts were concerned with the related issue of precedent and Plan integrity, and that the witnesses were dealing with the supposed effects of future resource consent applications, as if these were effects on the environment, and inviting the court to make findings on the same<sup>19</sup>.

The Court was also concerned that the experts' evidence was "*predicated upon an unstated fact; namely that the rules (and methods) express decisions made in relation to the agglomerate or accumulative effects of future retailing within B3 zone.*" Although one of the witnesses agreed, in answer to the Court's question, that he had not specifically considered whether the zones and the 'lines on the map' were correct, he had assumed that they were<sup>20</sup>.

While the Court considered that it may be that the business zones could only accommodate a fixed proportion of all retailing sites, this was not expressly stated in the Plan. The Court considered that the assumption that the zone may accommodate a fixed proportion of retail activity appeared to underlie the evidence of the Council's witnesses<sup>21</sup>.

The appeal was declined and the resource consent was not granted. The Court found that achieving the overall purpose of sustainable management under s 5 RMA would be better served by declining the appeal. On appeal, the High Court upheld the Environment Court's decision to decline the appeal.

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<sup>17</sup> *Stirling v Christchurch City Council* [2010] NZEnvC 401.

<sup>18</sup> *Stirling v Christchurch City Council* [2010] NZEnvC 401 at [66].

<sup>19</sup> *Ibid* at [142].

<sup>20</sup> *Ibid* at [143].

<sup>21</sup> *Ibid* at [144] – [145]

Even if it seems obvious to you that certain criteria are met, take the time to spell out this in your evidence. If lengthy, include the information and analysis in an appendix to your evidence. This will allow the Court to assess the expert's evidence and will result in more convincing and credible evidence on behalf of the expert. Witnesses should also take care not to make assumptions or to rely on requirements not specifically stated in the relevant planning documents.

## **Conclusion**

The case summaries (both new cases and updates on any 2012 paper) show that it is important to keep up with how the Court is treating assessments to ensure that your own reports, including traffic impact assessments, cover all expected matters. You should also, at least, be generally aware of considerations for resource consent applications, including how much information is needed for notification so that you can also tailor your reports accordingly. Keeping up with case law in your area will also help you to meet your RM obligations.

At the end of the day, it is your reputation on the line – and your credibility. When preparing evidence, form your views based on solid facts and analysis and have confidence in that opinion. Make sure that you remain independent from your client and do not advocate for them. Your role is to give an independent expert opinion on their proposal or position. No-one expects you to "die in a ditch" for the client.

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## **REFERENCES**

DOUGLAS, A (2012) Stand Up and Deliver Expert Evidence, March 2012, IPENZ Transportation Group Conference 2012