

BEFORE THE ENVIRONMENT COURT

Decision No. **C136** /2008

ENV-2007-CHC-000277

IN THE MATTER of an appeal under the First Schedule to the
Resource Management Act 1991

BETWEEN ASSOCIATION FOR INDEPENDENT
RESEARCH INC

Appellant

AND THE CANTERBURY REGIONAL
COUNCIL

Respondent

Court: Environment Judge C J Thompson, Environment Commissioner P A Catchpole,
Environment Commissioner W R Howie

Heard at: Christchurch on 17 November 2008.

Counsel/Appearances:

P D Anderson for the Association for Independent Research Inc

P James for the New Zealand Transport Agency – s274 party

M Oakenshield – s274 party

M Perpick and M A Mehlhopt for the Canterbury Regional Council

DECISION OF THE COURT

Decision issued: **12 DEC 2008**

A. The Consent Order proposed by AIR and the Council will be confirmed and the AIR
appeal is allowed to that extent

B. Costs are reserved



Introduction

[1] Mr Mark Oakenshield lodged a Notice under s274 of the Act, and became a party to an appeal lodged by the Association for Independent Research Inc (AIR) against the Canterbury Regional Council's decision in respect of the Proposed Canterbury Natural Resources Regional Plan, Chapters 1 to 3 – Air Quality (the Air Plan).

[2] After extensive mediation and discussions between the parties, an evidence exchange timetable was put in place to ready the appeal for a hearing, scheduled to begin on 17 November 2008. In the afternoon of Thursday 13 November the Court was advised that the Council and AIR had settled their differences over the Air Plan, and that a proposed Consent Order containing agreed amendments to the Air Plan would be presented to the Court. AIR advised that, except for those parts of it necessary to provide a basis for the proposed Consent Order, it withdrew its appeal. In a telephone conference with the parties later that afternoon Mr Oakenshield advised that he was not a party to that proposed Consent Order, did not agree with it, and maintained his opposition to the Air Plan.

The hearing

[3] The appeal therefore proceeded, as arranged, on 17 November. Mr James indicated that the NZ Transport Agency (formerly Transit New Zealand) was content with the position reached between the Council and AIR, together with the settlement of other related appeals. He sought and was given leave to withdraw. We note also that Mr Harold Thomas had given notice under s274, but advised the Court in a note dated 16 March 2008 that he did not wish to be heard and he did not participate in the mediation, or appear at the hearing.

[4] Counsel for AIR and the Council agreed that they did not wish to present any further evidence, nor did they wish to cross-examine each other's witnesses. Mr Oakenshield did however wish to cross-examine the witnesses for the Council and AIR, and they were called for that purpose. Before he proceeded to do that, Ms Perpick submitted that because the AIR appeal had been partially withdrawn on the basis just indicated, any s274 party to that appeal and certainly one who, as here, joined the proceeding before the 2003 amendment of the section, would be confined to issues covered by the terms of the proposed Consent Order. We

think that proposition must be right – a s274 notice is not an appeal in its own right and has no independent life: - see *Mullen v Parkbrook Holdings Ltd* [1999] 2 NZLR 312 and *Halswater*



Holdings v Selwyn DC (C126/99). It needs to be said though that in the end this point has made no practical difference to the outcome. Mr Oakenshield can be reassured that his concerns, which proved to be on a very narrow point, have been considered without being confined by technical niceties of law.

[5] In common with the evidence lodged for all witnesses, the members of the Court had pre-read the material lodged by Mr Oakenshield as his evidence-in-chief. This was not a *brief* in the conventional sense – rather it was a collection of material such as copies of letters to the editors of various papers and publications, and extracts from various articles and reports, mostly without provenance. While this perhaps did not present Mr Oakenshield's position to its best advantage, we understood clearly enough from the material, his responses to Mr Anderson's questions, and our exchanges with him in the course of the hearing, that he accepts that the general thrust of the Air Plan will come into effect. What he wishes to see however is rather more compromise from the Council in requiring people of limited means to comply with it. While not abandoning his argument that the Air Plan is at least partly based on dubious science about sources of pollution and the causes of illness and mortality attributed to it, the primary point he eventually advanced is that it will impose an unfair cost burden on those least able to pay it. We shall return to this shortly.

Background

[6] While some scientific argument may remain about its extent, and its sources, there is a measure of agreement that Christchurch does have an air pollution problem, particularly in the winter months. The pollution component at issue here is air-suspended particulates of less than 10 microns in aerodynamic diameter, known in shorthand as PM₁₀. These can be produced by a number of disparate sources – vehicles using petroleum fuels, the burning of rubbish and waste, and industrial discharges, are but some. Relevant to the current debate though is the production of PM₁₀ by the burning of wood in urban domestic heating fires. There is no doubt that this is a significant source – at one end of the spectrum there is evidence that 80 – 90% of winter night PM₁₀ in Christchurch comes from domestic fires. Other evidence suggests that to be an exaggerated figure, but even then there was an acceptance from Dr John Hoare, the Secretary of AIR, that most – ie more than 50% - would be from that source.



The National Environmental Standards

[7] The coming into force on 1 September 2005 of the relevant parts of the imposingly named Resource Management (National Environmental Standards relating to Certain Air Pollutants, Dioxins, and Other Toxics) Regulations 2004 (NES) had a profound influence on AIR's position and the course of this appeal. In brief, the NES set an ambient air quality standard (by way of what are called *threshold concentrations*) for PM₁₀ contaminants of:

50 micrograms per cubic metre [50µg/m³] expressed as a 24-hour mean with a permissible excess of One 24-hour period in a 12 month period.

The structure of the NES is somewhat complex. But the driving factors for the Council are that; first, if the ambient air quality standard for PM₁₀ is not achieved by 31 August 2013, no resource consent for the discharge of any PM₁₀ into the Christchurch airshed (ie Christchurch Clean Air Zone 1) may be granted after that date. Secondly, in the period up to 2013, Regulation 17 applies because the PM₁₀ concentration already breaches the standard. That means that any resource consent for a discharge must be declined if the discharge is likely to cause, at any time, the concentration of PM₁₀ in the airshed to be above the straight line path defined in Regulation 17(5).

[8] It is also to be noted that Regulation 22 prohibits the discharge to air of any particles from a woodburner installed after 1 September 2005 in a building on a property of less than 2ha, unless it complies with the design and thermal efficiency standards specified in the Regulations.

[9] It is clear that presently the ambient air quality in Christchurch airshed falls well short of the NES standard. The evidence of Ms Teresa Aberkane, the Council's Air Monitoring Team Leader, is that concentrations of PM₁₀ have been greater than 50µg/m³, and sometimes 3 or 4 times that, on up to 51 days in a year over the last 10 years. As mentioned, the actual contribution of urban domestic burning to those exceedances is debated. But the Council's evidence, from Ms Aberkane and Mr Roger Cudmore, an air quality management consultant, is that it is up to 90%, and that if the NES (and the matching provision of the Air Plan, Objective AQL3) are to be complied with it will be necessary to reduce domestic emissions by 85% from 2002 levels.



[10] It is Mr Cudmore's evidence that, on the projections of what the Air Plan will achieve if complied with, there is no room for comfort. Even with good compliance, meeting the NES standards will be an *only just* outcome, and it is possible that it may not in fact be achieved.

[11] For present purposes though, compliance with the NES is what is sought. As Dr Hoare put it, the advent of the NES changed the topic of the debate from being about what the maximum PM₁₀ level should be, to one about how the 50µg/m³ level is to be achieved.

The Clean Heat Project

[12] The Clean Heat Project is a Council initiative, commenced in 2003 and adopted through its Annual Plan and Long Term Council Community Plan (LTCCP) process. It is not therefore being achieved under the Resource Management Act and not the subject of this appeal. An explanation of it is important to the outcome of the appeal nevertheless. Its aim is to assist in the replacement of about 26,400 domestic open fires and non-complying woodburners with what are described as *approved clean heat appliances*. The scheme is not intended to provide heating for a whole house – rather it is to replace the main source of heating in the main living area of the house with an appliance appropriate to a room of that size.

[13] The project is funded by a targeted rate of \$8.44 per \$100,000 of property capital value. Additionally central Government, through the Energy Efficiency and Conservation Authority, contributed \$900,000 in 2007/08, and the Council hopes for double that in the current year. All up, it is intended to raise some \$60M over the ten years to 2012/13, so the rate of conversion should be between 3000 and 3600 homes per year.

[14] For property owners who are the holders of a Community Services card, the full cost of conversion is provided. This will cover the costs of removing or boarding up the fireplace or burner; the provision and installation of an approved appliance and the retrofitting of insulation to meet building standards. A lesser rate of subsidy is available for other owners, with a higher level (40%) subsidy to encourage landlords of rental properties to convert. As an alternative to a subsidy, an interest-free loan to a maximum of \$4,200, repayable over 10 years or on the earlier sale of the property, is offered. Mr Kenneth Lawn manages the Project for the Council. His evidence was that approved appliances cover the range of heat pumps,

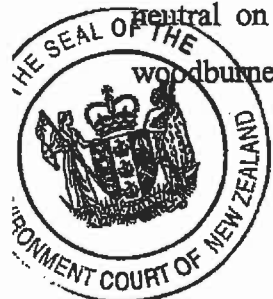


nightstore heaters, fixed-flue gas and diesel heaters, and low emission solid fuel and pellet fires ...where they can meet the project's particulate emissions criterion. Because of the scale of the project the Council has been able to negotiate very competitive prices from suppliers and savings of around \$1000 per conversion over normal retail cost are available.

[15] On the face of it, this seems like a fair, even generous, way of meeting Mr Oakenshield's concerns. He agrees that, on paper, that is so. But his concern is that the way the project is being administered *on the ground* makes it unattractive for low income homeowners. His evidence is that there are many reports from those people that when the independent assessors engaged by the Council to approve conversion subsidies actually come to the houses, they decline to approve conversions to approved woodburners, and will only approve electric devices such as heat pumps. This, he says, while meeting the capital costs of conversion, sets up low-income people with devices that are expensive to use, and mean that they will not use them, or they will be encumbered with winter power bills beyond their means to pay.

[16] Mr Lawn's response to that assertion is that no one has to convert to a device they do not want. That is true enough in the sense that no one has to take up the subsidy scheme. But he does acknowledge that, for instance, the project would not offer a woodburner option to replace an open fire in a small room requiring less than 4KW to heat it to the required level. That is because a woodburner is capable of producing much more heat than that, and would be regarded as a wasteful use of resources. So it has to be accepted that there is not an absolutely free choice of a replacement device. To take advantage of the scheme, some homeowners may have to forgo the option of a woodburning device, even if they have access to a source of free firewood and thus to heating at what would otherwise be virtually nil capital and revenue cost.

[17] On a semi-related topic, it needs to be understood there is nothing in the Air Plan which requires an existing woodburner to be replaced by some other form of heating. The Air Plan is neutral on that point: - the existing device can be replaced *as of right* by a complying woodburner, or any other complying device of the homeowner's choice.



[18] Notwithstanding this concern about the project, to date the uptake appears to be healthy. There have been 12,200 conversions taking advantage of one or other of its forms of assistance, 6032 of which have been the full-assistance option. Some 60.2% of those (ie c7,300) have been to heat pumps, 19.2% (c2,300) to woodburners, and 16.9% (c2,000) to pellet fires. A 2006 survey of 300 customers indicated that, after conversion, 32% found their overall heating costs cheaper than before; 21% about the same, and 29% found them more expensive.

[19] We are not in a position to say whether the Council's assessors are displaying a bias towards electric heating, or are doing no more than simply applying the criteria of the project. We assume though that the Council will be concerned that this belief exists, and in some circles is arousing opposition to a project which was designed to minimise the social costs of meeting the NES standards.

The approach to considering the Air Plan's provisions

[20] We agree with the approach outlined by Ms Perpick. That is, the Act requires a top-down approach in considering the provisions of the Air Plan. The Plan is to give effect to the overall purpose and principles of the Act, as contained in Part 2. The objectives and policies set the scene in the Plan and are presumed to implement Part 2, and the rules are one of the methods by which they are given effect. This Plan Change was notified as long ago as 1 June 2002, meaning that the statutory framework to be applied is that existing before the amendments to the Act in 2003 and 2005.

[21] Prior to the 2003 amendment, the provisions of s32 describing the content of the duty imposed on planning authorities were contained in subsection (1):

(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.

[22] These requirements were summarised in what were then known as the *Nugent* rules; - set out in *Nugent Consultants Ltd v Auckland CC* [1996] NZRMA 481. The provision:

- Has to be necessary in achieving the purpose of the Act;
- Has to assist the Council to carry out its function of control of the actual and potential effects of the use, development or protection of the resource in order to achieve the purpose of the Act;
- Has to be the most appropriate means of exercising that function;
- Has to have a purpose of achieving the objectives and policies of the Plan.

Application of the tests

[23] In this situation the position appears clear cut. One of the Council's functions is to protect the life-supporting capacity of the air resource for present and future generations: - that is one of the purposes of the Act. It cannot, on any reasonable view of the evidence, do so without effectively phasing-out the use of non-complying, PM₁₀ emitting, heating. To do so must therefore be the appropriate means of exercising that function. All of that goes to achieving the objectives and policies of the Plan, which in turn are intended to achieve the purpose of the Act.



[24] We accept that the phasing out of non-complying heating must inevitably impose a cost on individuals. There is nothing novel about that as a concept. Once upon a time, people simply threw their body waste and other refuse out the window and into the street. The advent of municipal sewerage systems, and the compulsion to connect each and every house to them, no doubt imposed costs on individuals also, but that was justified by the health and amenity benefits which undoubtedly accrued. Now nobody would dream of suggesting a return to the way things were, and the cost is accepted as inevitable.

[25] The Council has recognised the potential capital costs of the transition, and has constructed a scheme that, in principle, goes a very long way to cushion the blow for those least able to meet the cost themselves. In some cases, the outcome may be a living area heating source that costs more to run than their present source, especially for those fortunate enough to be able to access a free supply of firewood.

[26] This is the nub of Mr Oakenshield's concern. He accepts, as any rational person must, that Christchurch's air pollution problems are a health risk to its population, not to mention their severely adverse effects on the City's amenity values. But it is clear that inadequately heated housing is also a health risk, and the cause of numerous premature deaths over the winter period.

[27] We accept that the purpose of the RMA is not just the abstract protection of environmental quality. Section 5 provides:

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 wellbeing 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.

(Emphasis added).



[28] So the ability of people to provide for their economic wellbeing, and for their health, is part of the purpose of the Act. If steps are taken which impinge on those abilities, as Mr Oakenshield fears will happen here, that is obviously of concern. We do not though see the position as being a choice between dealing with the clear and present health risk posed by air pollution, as opposed to the potential health risk posed by people being financially unable to adequately heat their homes over winter. The air pollution issue is one that can be dealt with under the RMA, and undoubtedly comes within the s5 rubrics of enabling people and communities to provide for their health, and of safeguarding the life-supporting capacity of air. As a resource management issue, the position is stark. As part of dealing with that wide issue, as AIR has recognised, there is no option but to take the necessary steps to comply with the law as contained in the NES and to do that, the day of the non-complying, PM₁₀ emitting, burner is all but over.

[29] On the other hand, the possibility that individuals may not be able to meet their future heating costs is a social welfare, rather than a resource management, issue and should be dealt with as such. The solution is not to attempt to give some ill-defined discretion to enforcement officers who may be called upon to investigate the possible or alleged use of non-complying fires in the future. It may well be that in the administration of the Clean Heat Project there could be more flexibility in assessing what replacement units are appropriate in each case, having regard to the wishes and resources of the individual, but the scheme, as such, is not before us and we have no direct input into that.

Result

[30] The Plan Change in the form now agreed between the parties, except of course Mr Oakenshield, meets the legal tests and is an entirely tenable means of meeting the Council's functions and duties. While we respect the sentiment behind Mr Oakenshield's position, it cannot be upheld in this context. The amendments to Chapters 1 and 3 of the Proposed Canterbury Natural Resources Regional Plan contained in the draft Consent Order presented to the Court at the hearing are approved.



Costs

[31] It is the usual practice of the Court not to award costs on appeals against Plan provisions but in case there should be any application, as a matter of formality, costs are reserved. Any application should be lodged within 15 working days of the issue of this decision, and any response within a further 10 working days.

Dated at Wellington this 12th day of December 2008

For the Court

The seal of the Environment Court of New Zealand is circular. It features the text "THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND" around the perimeter. In the center is the coat of arms of New Zealand, which includes a crown, a shield with a cross, and two figures holding a shield.

C J Thompson
Environment Judge

