

BEFORE THE ENVIRONMENT COURT

Decision No. *C 24* /2008

IN THE MATTER of appeals under the first schedule to the
Resource Management Act 1991

BETWEEN ASSOCIATION FOR INDEPENDENT
RESEARCH INC
M OAKENSHIELD
(ENV-2007-CHC-000260 and 277)
Appellants

AND THE CANTERBURY REGIONAL
COUNCIL
Respondent

Court: Environment Judge C J Thompson sitting under s279 of the Act

Heard at: Christchurch on 26 February 2008.

Counsel/Apearances:

J A Hoare for the Association for Independent Research Inc

M Oakenshield for himself

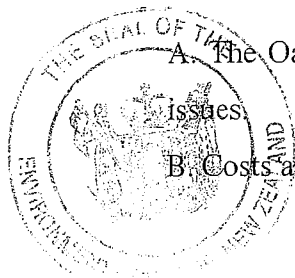
M Perpick and M A Melhopt for the Canterbury Regional Council

DECISIONS ON APPLICATIONS TO STRIKE OUT APPEALS

Decision issued:

A. The Oakenshield appeal is struck out. The AIR appeal is confined in scope to the listed issues.

B. Costs are reserved



Mr Oakenshield's appeal

[1] By a document dated 11 October 2007 Mr Mark Oakenshield purported to lodge an appeal with the Court 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). At a prehearing conference before Judge Jackson on 18 December 2007, the Council's intention to apply to strike out his appeal was foreshadowed and, in accordance with timetable orders then made, the application was lodged and came before me on 26 February 2008.

[2] As I indicated at the conclusion of submissions, I agree with the Council's submission that the short and decisive point is that Mr Oakenshield was not a submitter to the Council in respect of the Air Plan.

[3] The issue is governed by Clause 14 of Schedule 1 to the Act, the relevant part of which provides:

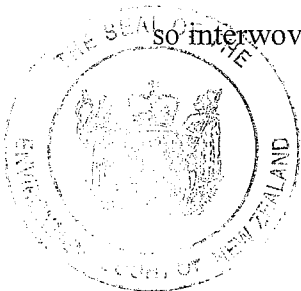
1) **A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—**

- (a) a provision included in the proposed policy statement or plan; or
- (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
- (c) a matter excluded from the proposed policy statement or plan; or
- (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.

(2) However, a person may appeal under subclause (1) only if the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.

(Emphasis added)

In respect of appeals against the provisions of a proposed plan, as opposed to appeals in respect of resource consents, Clause 14 is the sole provision in the Act which grants a right of appeal. The wording is plain – only persons who made a submission can appeal. Mr Oakenshield acknowledges that he did not lodge a submission on the Air Plan, but argues that he made a submission on the Council's Clean Heat Loan Scheme and that the two things are so interwoven that one should be deemed a submission on the other.



[4] I am afraid that the point is hopeless. The Loan Scheme is not the Air Plan – indeed it is not a document prepared under the Resource Management Act at all. Nor can the position be saved by resort to waivers or extensions under s281, still less under s37. Section 37 relates only to the time or method of service of documents. Section 281 assumes that the applicant for a waiver is a person entitled to appeal – it does not empower the Court to invest a right of appeal where none otherwise exists.

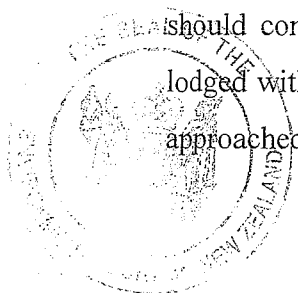
[5] The Council's position is undoubtedly correct, and Mr Oakenshield's purported appeal must be struck out. I note however that Judge Jackson has already confirmed his position as a s274 party to two other appeals in respect of the Air Plan, so he is not without an opportunity to put his position forward, so long as he remains within the scope of the appeals to which he is a party.

The Association for Independent Research Inc's appeal

[6] The Association for Independent Research Inc (AIR) has also lodged an appeal against the same Council decision. The Council does not seek to have the AIR appeal struck out in its entirety. But it does seek to have it confined in scope to the issues that have properly and clearly been pleaded in the documents that AIR has lodged. In this case, it is para 2 of Clause 14 of Schedule 1 that is important – see para [3] above.

[7] AIR's submission to the Council did not seek the deletion of *all* of Chapter 3, and of the *relevant* parts of Chapter 1 of the proposed plan. Rather it sought the deletion and amendment of specific provisions only. The first Notice of Appeal sought the deletion of all of Chapter 3 and the relevant parts of Chapter 1 – a much wider proposition altogether. However, an amended Notice of Appeal, in paragraph 16, asks for *...the parts of Chapter 1 and Chapter 3 relevant to the above appeals to be rejected, or such other relief as gives effect to the concerns raised*. While that brings the scope somewhat closer to the original submission, it remains vague and ambiguous.

[8] Ms Perpick has very carefully set out in her submissions the basis on which the Court should consider issues of scope, particularly when the documents have been prepared and lodged without legal or planning assistance. In short, I entirely accept that the task should be approached *...in a realistic and workable fashion rather than from the perspective of legal*



nicety... and the enquiry is to be whether the relief sought is ...fairly and reasonably within the general scope ... of the original submission. See Royal Forest and Bird Protection Soc v Southland DC [1997] NZRMA 408 and Vivid Holdings Ltd [1999] NZRMA 467.

[9] I have taken the time to reread the documentation since hearing the parties. I have come to the view that Ms Perpick's submission that one needs to read AIR's original submissions with paragraph 14 of the amended Notice of Appeal is correct, as it is that paragraph which nominates the Plan provisions which are appealed against. It reads:

The provisions of the Plan which define and seek to control the use of particular fuels and fuel burning devices are appealed. This includes:

- [a] Definitions of fuels based on emissions per kilogram of fuel, rather than heat output;
- [b] Restrictions on the use of wood and coal for domestic heating purposes; and
- [c] Restrictions on home heating methods and garden fires during the period from mid-September to mid-April; and
- [d] The prohibition on open fires; and
- [e] Controls on the installation of enclosed burners.

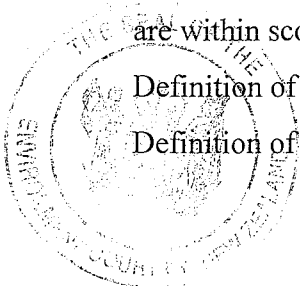
Read in that way, paragraph 16 of the amended Notice of Appeal (see para [7] above) is less ambiguous, and attention can be focussed on the issues which particularly concern AIR.

[10] Dr Hoare's submissions were, with due respect to him, not entirely easy to follow. I suspect that the real reason for that is that he has not quite grasped the necessity for some precision in confining the issues on appeal to those that have been raised at first instance to protect the fair opportunity for people to participate in an orderly way. Nor, I think, does he yet quite understand the difference between "pleadings" and evidence and submissions given at a hearing.

[11] At para 28 of her submissions Ms Perpick sets out a table of matters raised in AIR's original submissions, and which are also referred to, at least by implication, to in the amended Notice of Appeal. I have been through the table and see no reason to disagree with it, indeed if it errs at all, it seems to err on the side of liberality. The provisions of the Air Plan which are within scope of AIR's appeal are therefore:

Definition of "Fuel" – Chapter 1

Definition of "Small scale fuel burning device" – Chapter 1



Policy AQL1
Policy AQL4
Policy AQL11
Policy AQL13
Policy AQL14
Policy AQL16
Policy AQL 17
Policy AQL21
Rule AQL2
Rules AQL4 and 5
Rule AQL9
Rule AQL10
Rule AQL11
Rule AQL 29

Result

[12] There will therefore be an order that Mr Oakenshield's appeal is to be struck out. The AIR appeal is to be confined in its scope to the matters just listed, and care should be taken to confine evidence to those issues.

Costs

[13] Costs are reserved.

Dated at Christchurch this 26 day of February 2008

For the Court



C J Thompson
Environment Judge

