

## H. Appeal Advice

### APPEALS TO THE HIGH COURT ON QUESTIONS OF LAW – GUIDELINE

1. Section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 makes special provision in respect of appeals in relation to the decisions on the Natural Resources Regional Plan. It states:

**66      *Right of appeal to High Court on question of law***

- (1) *No person may appeal to the Environment Court under clause 14 of Schedule 1 of the RMA in respect of any of the decisions referred to in section 64.*
- (2) *However, a person who made a submission under clause 6 or 8 of Schedule 1 of the RMA on a proposed regional policy statement or plan may appeal to the High Court, but only on a question of law, against a decision referred to in section 64.*

2. This means that the right of appeal to the Environment Court which would normally arise is not available and that any appeals may only be made to the High Court and are restricted to questions of law. Any appeal to the High Court may relate only to a provision or matter raised in your submission or further submission on Chapters 4-8 of the Natural Resources Regional Plan.
3. The purpose of this note is to provide some basic guidance to submitters as to what constitutes a question of law, to assist them in determining whether they have valid grounds for an appeal against the decision of the Canterbury Regional Council in relation to their submission on the Natural Resources Regional Plan.
4. What constitutes a question of law can involve complex consideration of a range of factors. This note is not intended to be legal advice and submitters are encouraged to seek their own legal advice on this issue.

#### **Legal tests**

5. The basic proposition is that a question of law relates to the interpretation and application of legal principles, rather than determinations of fact based on the evidence before the decision-maker or the merits of the decision itself. Decided case law<sup>1</sup> is to the effect that the High Court will interfere with the decision of the inferior decision maker (in this case the Canterbury Regional Council rather than the Environment Court) if it considers that in making that decision they:
  - (a) Applied a wrong legal test; or
  - (b) Came to a conclusion without evidence or one to which, on evidence, they could not reasonably have come; or
  - (c) Took into account matters which they should not have taken into account; or
  - (d) Failed to take into account matters which they should have taken into account.

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<sup>1</sup> *Countdown Properties (Northland) Limited v Dunedin City Council* [1994] NZRMA 145, 153.

6. The courts have also held<sup>2</sup> that procedural decisions which amount to a breach of the principles of natural justice (such as the right to a fair hearing) and which substantially affected the shape of a hearing may also constitute grounds for an appeal on a point of law.
7. Other relevant legal principles can be summarised as follows:
  - (a) The High Court's role is to decide whether the decision maker has acted within its statutory powers.
  - (b) The High Court must not determine whether the decision of the decision-maker was right or wrong but only whether the correct test was used and all proper matters were taken into account.
  - (c) The weight which the decision-maker gave to any particular matter when making an assessment is not a matter for consideration by the High Court.
  - (d) The High Court will not consider an argument on the merits of the Council's decision in the guise of a question of law.
8. In order for an appeal on a question of law to succeed, the High Court must not only accept that an error of law was made but that the error was material to the final decision of the Council in order for the Court to grant relief.

**Potential grounds for appeal on questions of law**

9. Having regard to the above, before lodging an appeal on a question of law, submitters will need to carefully consider whether the Council in making its decision on the relevant aspect of the Natural Resources Regional Plan:
  - (a) The Council applied a wrong legal test; or
  - (b) The Council reached a decision not available to it on the evidence or one to which, on the evidence, it could not reasonably have come; or
  - (c) The Council took into account matters which it should not have taken into account; or
  - (d) The Council failed to take account of matters which it should have taken into account; or
  - (e) The Council made a procedural decision which amounted to a breach of natural justice which substantially affected the shape of a hearing; and
10. It is also necessary to consider whether the error was material to the Council's decision.
11. The above analysis represents a very brief overview of complex law in relation to questions and errors of law. As noted, independent legal advice is recommended if you are considering lodging an appeal in relation to the decision on your submission or further submission.

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<sup>2</sup> *Ancare NZ Ltd v Wyeth [NZ] Limited* [2009] 3 NZLR 501