

# Restricted Discretionary Activities

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This article, written by Michael Garbett, a partner at Anderson Lloyd, follows on from an earlier article entitled “Restricted Discretionary Activities – Are They Really?”, which discussed different approaches adopted in the Environment Court towards assessing resource consents for restricted discretionary activities. The High Court has since issued its decision in *Auckland City Council v The John Woolley Trust* (CIV 2004-404-3787). This article analysis that decision and its practical implications.

This High Court decision considered whether resource consent should be granted for the removal of a Himalayan cedar tree. The resource consent being sought was for a restricted discretionary activity, which the Auckland City Council refused. The Council considered the factors in the Plan all related to protection of significant trees. The Plan did not cover matters which supported removing the tree, such as the health and well-being of the occupants.

## High Court Decision

The High Court determined that the matters contained in Part 2, Resource Management Act 1991, are relevant to considering a resource consent for a restricted discretionary activity, provided they are not relied on to decline consent or impose conditions. The Court stated:

*...any application for consent to a restricted discretionary activity is subject to Part 2 but with the important proviso, evident from section 77B(3)(c), that matters under Part 2 may not be relied upon to decline consent for a restricted discretionary activity. Similarly, Part 2 matters may not be relied upon to impose conditions on a grant beyond those relevant to the matters upon which the Consent Authority has restricted its discretion in the plan.*

This decision is significant because an applicant for a resource consent for a restricted discretionary activity can argue there are relevant matters in Part 2, which justify consent being granted, despite those matters not being listed as relevant in the District Plan.

Importantly opponents of the application cannot point to matters under Part 2 to justify the consent being refused or conditions imposed.

This creates a subtle distinction. It follows that if an applicant is able to call evidence that its application contributes to their health and safety, then opponents are equally entitled to call evidence in rebuttal that those claims are either overstated or outweighed by other considerations under Part 2. If this is the case, then opponents can call evidence and argue on any matter relevant under Part 2 of the Act whether or not the issue is listed as relevant in the District Plan.

This distinction will lead to more cases arguing whether evidence being called by an opponent of a resource consent is simply rebutting what the applicant alleges, or is attempting to have the consent refused or conditions imposed based on matters under Part 2. For the present, it appears that the first approach is acceptable and the second is ruled out by the decision of the High Court.

The High Court concluded that this interpretation is consistent with what Parliament intended. These subtle distinctions further complicate the resource management process rather than simplify it creating another complexity in an already immensely complex regime. If this is how Parliament intended the Act to operate, then Parliament need to re-visit this part of the legislation.

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