

APPENDIX 3.4.1 - Case law - centres and commercial activity

The planning argument for managing the distributional effects of diluted commercial and retail activity is based on:

- i. That new commercial players can affect the viability of trading organisations of the same type; and therefore
- ii. Key businesses in an existing centre, or the CBD, can be affected to such a degree that the centre's viability will be eroded; and as a result
- iii. The community will be unable to provide for their well-being in this locality.

The issue is not that new retail activity will affect the trading circumstances of organisations of the same type, as these are purely trade competition considerations that the council cannot consider under s. 104(8), 66(3) and 74(3) of the Act. Part 11A, as inserted into the Act in 2009, specifically excludes trade competitors and surrogates from registering a statutory interest where the direct basis of that interest would relate to trade competition or the effects of trade competition (*General Distributors v Foodstuffs Properties (Wellington) Limited ENV-2011-WLG-000053/54*). Accordingly, there is now greater responsibility for Territorial Authorities to clearly enunciate and justify the management of business activities within their respective Districts as they can no longer rely on interested 'third' parties to test the robustness of policy prior to application. Accordingly, for Council's to recognise and provide for the value of their centre networks, there is a need to be pro-active and explicit as to the centre hierarchy and integration with urban form and transport networks. Intervention is not justified where a new business would result in the closure of a trade competitor. However, it can be justified when the closure of anchor businesses would result in the material decline of a centre. It is the effects on the viability and associated amenity of the centre as a whole that is the key consideration, rather than the effects on individual businesses themselves.

Consideration of distributional effects under the RMA 1991

Despite the changing legal landscape relating to retail distribution since the inception of the RMA in 1991, it is now settled law that a proposed activity's economic and social effects may be a relevant matter for a consent authority when considering:

- i. the potential effects of an activity on the environment for the purposes of notification (s. 95D(d))
- ii. the substantive decision as to whether to grant consent (s. 104(1)(a))
- iii. a territorial authority's planning functions pursuant to s. 72 and 74(1) in terms of the purpose and matters to be considered by a territorial authority in drafting its district plan. This is qualified by the need to consider the integrated management of effects, including natural and physical resources (ss. 31), and excluding any regard to trade competition (s. 74(3)).

Potential effects of commercial distribution are sometimes referred to as retail distributional effects and they have now been recognised by the Environment Court in a number of cases. Such effects occur where a new business (or cluster of businesses) affects key businesses in an existing centre to such a degree that the centre's viability is eroded, causing a decline in its function and amenity, and disabling the people and communities who rely upon those existing (declining) centres for their social and economic well-being.

Although retail distributional effects are a relevant consideration for a consent authority, the Environment Court has made it clear that those effects must be significant, but not necessarily ruinous, before they could properly be regarded as going beyond the effects ordinarily associated with trade competition. (*Northcote Mainstreet vs North Shore City Council (High Court, CIV-2003-404-5292)*, Randerson J stated: "In regard to shopping centres, I would not, with respect, subscribe to the view that the adverse effects of some competing retail development must be such, as to be ruinous before they could be

considered. But they must, at the least, seriously threaten the viability of the centre as a whole with ongoing consequential effects for the community served by that centre.”)

Principles of distributional case law

Case law relating to the distribution of retail activity tries to balance enablement and consolidation of urban form and growth.

Case law position (synopsis)

Urban form and growth

Enablement

Councils can intervene to protect physical resources. References in the RMA restricting the ability to consider trade competition are subservient to the overall thrust of the RMA as set out in Part 2 and in particular s. 5. If trade competition reaches such a significant stage where a community asset represented by (for example) the CBD is weakened to an unacceptable degree, then a council can intervene. (*Westfield NZ Ltd & other v Upper Hutt City Council W44/2001*. Also *Northcote Mainstreet Inc v North Shore City Council - High Court CIV-2003-404-5292*)

The strategic context of a district plan, as stated through its policies and objectives, needs to very clearly set out the direction of the city with regard to the interrelationship between residential, commercial and transport infrastructure. Such a framework provides a policy benchmark for evaluating commercial development within the wider urban form and development backdrop of the Plan.

It is appropriate that a plan avoid ad-hoc commercial development for a predicative role in terms of planning. A plan should provide some flexibility by providing criteria for consideration of new district centres and business retail parks. In the court's view, that establishes a clear balance between the certainty necessary for ordered development and confidence and flexibility to allow for change and growth. (*National Investment Trust v Christchurch City Council C152/2007*)

Consolidation Policy and Trade Competition. Councils can provide for the promotion of town centre consolidation as a legitimate resource management issue within their respective district plan. However, the statutory prohibition to disregard trade competition (s. 74(3)) cannot be undermined nor modified by objectives and policies of the plan. There is nothing in the Act that intends district plans to be determinative in this regard. (*General Distributors Ltd, Waipa District Council, NTC, Bilimag Holdings – High Court CIV-2008-404-4857*)

A strategy of encouraging the continued viability and upkeep of town centres is acceptable, provided such an approach does not inhibit development incapable of creating significant adverse distributional effects, either in isolation or cumulatively with other developments. (*Westfield New Zealand Ltd v Upper Hutt City Council W44/2001*)

Assessments of proposals should consider both positive and negative effects and some proposals may assist in enabling people and communities to provide for their well-being, health and safety. (*The Warehouse Ltd and Foodstuffs (South Island Limited) v Dunedin City Council – C101/2001*)

If objectives seek to reinforce a centres-based strategy for containing and enabling retail development, they must align with the opportunity for such retail growth to be met in centre. Where the development opportunity for in-centre retail development cannot be met in-centre, objectives seeking such cannot be easily justified. (*Bilimag Holdings Ltd v Waipa District Council C072/2008*)

It may not always be possible to graft all scales and forms of retail activity onto an existing centre without overwhelming its infrastructure and character. Ultimately, in such instances it may well come down to a consideration of a proposal on its merits, whether the proposal is appropriate in its location and meets the community's needs and preference, balanced against adverse effects such as noise, illumination and transport. (Progressive Enterprises Limited v North Shore City Council – W075/2008)