Locus Standi and Appeal Rights Under the Town and Country Planning Act 1953

by

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In *Clifford* v. *Ashburton Borough*,[1] Wilson J.'s oft-quoted remarks were as follows:[2]

> At common law an owner of the property could, subject to any contractual conditions binding on him and some restrictions imposed by the law of torts, do with it as he wished. In the interests of the community the Legislature has found it necessary to place further restrictions on such right. One such restriction was the power conferred on local authorities to make and enforce bylaws laying down standards and conditions for the erection or alteration of buildings. By far the most drastic erosion of the rights of property owners, however, has been the town and country planning legislation which authorised local authorities to prepare and enforce schemes for the control of the use of property within their respective districts. The Town and Country Planning Act 1953 is the latest flowering of such legislation in this Dominion.

Given this perspective, the importance of *locus standi* under the Act is clear—it is vital to understand when you, the rights of whom have been impaired, in turn have the right to object in protection of your rights. The standing of those who wish to safeguard their interests goes to the jurisdiction of the Council, Authority, or Appeal Board. If the Act does not give the requisite jurisdiction that is the end of the matter, for there is no equitable jurisidiction vested in the Board or Council.[3] Unfortunately, however, the act is far from clear as to the question of standing. The basic requirement is simply that you must be "affected", but to what degree and in what manner has been

[1] [1969] N.Z.L.R. 446 (S.C.).
[2] Ibid., 448.
[3] *Cropper* v. *Auckland City Corporation* (1957) 1 N.Z.T.C.P.A. 39 per Reid S. M. (Chairman) at 39. See also: *Levin Borough* v. *Horowhenua County* [1971] N.Z.L.R. 427 per Haslam J. at 434-435.

left almost entirely to the Board, or the Courts in their common law supervisory jurisdiction over the Board (and now under sections 42A and 42B of the Act). Certainly the word "affected" is qualified throughout the Act. Thus you can be "materially affected",[4] "directly affected",[5] "adversely affected",[6] "injuriously affected",[7] "affected in any way",[8] "just plain affected",[9] or you can "claim to be affected".[10] Surely an issue as basic as *locus standi* deserves better? It is proposed to examine the common law in New Zealand concerning the various appeal provisions under the Act according to whether they give rights to object and appeal concerning regional planning schemes, or concerning draft, proposed, or operative district planning schemes.

I. Regional Planning Schemes

Section 4(1) gives "every local authority affected" a right of appeal against the regional planning scheme so far as it conflicts or would conflict with the district scheme, and the Minister has a similar right in the public interest under section 4(2). In *Craig* v. *Hutt County Council*[11] the respondent Council argued that it was bound by section 4(1) to adhere to the regional scheme and thus the only right of appeal where the zoning objected to in the district scheme is also the zoning in the regional scheme is by the local authority under section 4(1) proviso, after an objection has been made under section 23 of the Act. It is not clear, but it seems the argument was that where the zoning objected to existed in both the district and regional schemes, section 4(1) over-rode the appeal provisions in section 26 concerning district schemes. In *Gunn* v. *Christchurch City Council*[12] the same argument appears to have been raised. In both cases it was rejected, but the suggestion in doing so was that section 26 gives jurisdiction to appeal against the regional scheme after an objection against the district scheme. This, it is submitted, cannot be correct. What must have been meant is that the fact of the Council being bound to adhere to the regional scheme by section 4(1) cannot affect the power of an objector (under section 26) or his supporters and

[4] S. 22A(2).
[5] S. 33(5).
[6] S. 38(13).
[7] S. 44(1).
[8] S. 34A(3).
[9] S. 23(1).
[10] S. 35(3).
[11] (1966) 3 N.Z.T.C.P.A. 7.
[12] (1961) 1 N.Z.T.C.P.A. 144. See also *De Thier* v. *Christchurch City Council* 1961) 1 N.Z.T.C.P.A. 148.

opposers (under section 23(3) proviso) to appeal against the Council's zoning *in the district scheme*. That is, the Council by refusing to appeal under section 4(1) proviso and refusing to change the zoning in the district scheme because of section 4(1) cannot remove an objector's right of appeal against the district scheme under section 26(1). However the result, it is submitted, is that anyone with standing to object to zoning in a proposed district scheme can on appeal to the Board also effect a change in even an operative regional scheme at the same time. If the zoning in the district scheme is changed by the Board the regional scheme must also be changed. Thus, section 4(1) is not in fact exhaustive concerning rights of appeal where the same zoning exists in the regional as well as the district scheme, and where change in the district scheme's zoning would mean conflict with the regional one.

Section 10(6) also gives the right to appeal to the Regional Authority or any local authority "affected" where the Regional or local authority has refused to approve any regional scheme. There have been no cases where the meaning of "affected" in sections 10(6) and 4(1) has been considered, but three criteria elsewhere in the Act are helpful. First, it is submitted that it must include those local authorities or joint committees "having jurisdiction in or adjacent to"[13] the area concerned. Second, it probably covers "the Council for every adjoining district which has any community of interest in any matter that could be affected".[14] Third, "the local authority having financial responsibility"[15] for any matter that could be affected must also be included.

II. District Schemes

A. Draft District Schemes

While a district scheme is "undisclosed"[16] or "draft", the only right of appeal and objection seems to be by the Council against the requirements of any public authority authorised to determine the location of public utilities in the Council's district scheme under section 21(9), and also against the requirements of the Minister or local

[13] S. 24(1).
[14] S. 22A(4).
[15] S. 33A(2).
[16] Section 2(4) of the 1966 Amendment Act provides that: "Every reference in any enactment or document to an undisclosed district scheme shall be read as a reference to a draft district scheme".

authority under sections 21(6) and 26(2).[17] Until the 1966 Amendment Act came into force sections 2(3) and 21(4) also gave rights of objection and appeal against a scheme in its draft stages,[18] but these were both repealed by the 1966 Act. The explanatory note attached to this Act in its Bill stages suggested that the protection by way of objection and appeal by sections 24 to 26 of the Act is sufficient safeguard. That it is submitted, must be correct—it could only frustrate the Council's important first task of getting a scheme down on paper and submitting it to the public in general if it were otherwise.[19]

Appeal rights against prohibition or refusal of the Council under sections 34A, 38, and 38A may be exercised while the scheme is undisclosed, but these sections give no right of objection or appeal against those provisions of the draft scheme itself which give rise to the prohibition or refusal of the Council. They will be discussed below.

B. Proposed District Schemes

A scheme or part thereof is "proposed" when it has been "recommended by the Council and publicly notified but has not become operative".[20] As the scheme has been publicly notified, the right to object and appeal is given to a wide class of persons. The clear intention of the Legislature is that this intermediate stage provide opportunity for public perusal and for resulting objections and appeals to be made.

1. Section 26:

This section confers the right of appeal on objectors under sections 21, 22A, 23 and 24.[21] It is these provisions that provide the required *locus standi* for appeals under section 26.

(a) Section 21:

Sections 21(7) and 21(8), covered by sections 26(2A) and 26(3), contain no problems of standing. "Person" in section 21(8) no doubt

[17] Section 21(7A) provides that any requirement under s. 21(7) must be publicly notified on receipt—thus s. 26(2A) must only arise under a proposed scheme. But, until notified, s. 21(7) requirements are part of the draft scheme: see the definition of "draft district scheme" in s. 2(1). Section 21(8) expressly applies "subsequent to public notification".

[18] See: *Cropper* v. *Auckland City Corporation* (1957) 1 N.Z.T.C.P.A. 39.

[19] Though Keith Robinson is apparently not so sure: *The Law of Town and Country Planning* (2nd ed., 1968), 67.

[20] S. 2(1).

[21] The right to appeal is given to all supporters and opposers of objections by s. 23(3). See also the definitions of "objection" and "objector" in s. 2(1).

includes a body corporate or incorporate under the definition in section 6 of the Acts Interpretation Act 1924.[22]

(b) Section 22A:

Objections to changes under section 22A are covered by sections 23 and 24 it seems. Clearly section 24 is not an alternative method to section 22A by which a proposed scheme can be changed.[23]

(c) Section 23(1):

Section 23(1) gives the right of objection to "every owner and every occupier of property affected by any proposed district scheme". First, the objector must be the "owner or occupier". In *Kamo Potteries Ltd* v. *Kamo Town Council*[24] the owner of mineral rights was found to be covered. Also, by the extended definition of "owner" in section 2(1),[25] a conditional purchaser is covered. However the extended definition does not cover a mere option to purchase:[26]

> The Board cannot construe [the words "has agreed to purchase"] so as to include a person who has the present right to purchase but who has yet to assume the obligation to purchase and may still elect not to do so.

Nor does it cover one who has agreed to purchase the property as agent for another. In *G. E. Stewart* v. *Green Island Borough Council*[27] it was found that the agent was as good as saying.[28]

> . . . I have not agreed to purchase the land but a principal whom I do not name has agreed to purchase the land.

Also, of course, the agreement to purchase must be legal and not in contravention of The Land Settlement, Promotion and Land Acquisition Act 1952.[29]

Second, there must be "property affected". By "property" is meant land, and not the wide definition contained in the Property Law Act 1952.[30] The leading case on section 23(1) is *Evans* v. *Gisborne City*

[22] See: *Pahiatua Borough Council* v. *Sinclair* (1964) 2 N.Z.T.C.P.A. 125. Also *Silver* v. *Wellington City Council* (1962) 2 N.Z.T.C.P.A. 28 discussed post at 17.

[23] *Wellington City Council* v. *Cowie* [1971]N.Z.L.R. 1089 (C.A.). Section 4(1) of the 1971 Amendment Act changed s. 22A to clarify this point. Section 22A(1) applies where change is desired before the last date for receiving objections to the proposed scheme, and the rest of s. 22A applies if that date has passed.

[24] (1962) 2 N.Z.T.C.P.A. 43.

[25] As amended by s. 2(1) of the 1971 Amendment Act, following the decision of the Court of Appeal in *Lange* v. *Town and Country Planning Appeal Board (No. 2)* [1967] N.Z.L.R. 898.

[26] *Rotorua Supermarket* v. *Rotorua City* [1972] N.Z.L.J. 71, per Turner S. M. (Chairman) at 72.

[27] (1972) 4 N.Z.T.P.A. 273.

[28] Ibid., 276.

[29] As it was in the *Stewart* case, supra.

[30] *Lange* v. *Town and Country Planning Appeal Board (No. 2)* supra., per McCarthy J. at 908.

Council.[31] The appellant had lodged a cross-objection to the Council's objection to its own scheme by which it was intended to charge a designation of "botanical gardens" to "reserve". He appealed under section 26 to the Board, claiming jurisdiction to object and appeal[32]

> . . . as a citizen of Gisborne in common with the interests of Gisborne citizens and the public generally.

Reid, S. M. (Chairman) found that the appellant's *property* must be affected, thus rejecting the appellant's contention that *any* owner or occupier of property within a district has the right to object to *any* provision of the proposed district scheme, even though it does not touch or affect his property. On appeal to the Supreme Court it was conceded that property must be affected, but the plaintiff claimed that all property within a district scheme is necessarily affected by the scheme and all its provisions.[33] Hutchinson, J. compared section 23(1) with its forerunner, section 17(3) of the 1926 Act, and concluded that the present provision recognises that there are properties within a scheme not affected by the scheme—in his opinion it is impossible to say that section 23(1) means all rateable property in the scheme area.[34] Counsel for the second defendant submitted that the section means only property "materially affected". This was also rejected by the learned judge, but he continued:[35]

> I go this far, however, with him that the affecting of the property must, for the purposes of the section, be appreciable—*de minimis non curat lex*.

The result, then, is that property must be affected. But it need not be affected "materially" though it must be affected "appreciably", under the age-old *de minimis* doctrine. However, in *Station Realty Ltd* v. *Henderson Borough Council*,[36] Turner, S. M. (Chairman) put it this way, concerning the similar section 35(3):[37]

> I construe the subsection as conferring a valid right of objection only upon those persons or bodies who demonstrate that if the application is granted they will be affected or are likely to be affected in some appreciable degree greater than or manner different from the degree or manner in which the general public will be affected.

Further, in *Tomas* v. *Rodney County*[38] Luxford, S. M. (Chairman) said:

[31] (1962) 2 N.Z.T.P.A. 25.
[32] Ibid., 26.
[33] *Sub. nom. Evans* v. *Town and Country Planning Appeal Board* [1963] N.Z.L.R. 244 at 247.
[34] Idem.
[35] Supra., 248.
[36] (1972) 4 N.Z.T.P.A. 190.
[37] Ibid., 192. He appears to consider that the only difference between ss. 35(3) and 23(1) is that the former does not require that "property" be affected: idem.
[38] (1970) 3 N.Z.T.C.P.A. 226, at 226.

> In the opinion of the Board, the effect referred to in s. 23(1) is an adverse effect in the nature of a detraction from amenities sufficient to justify a finding that it would be unreasonable and unjust to allow the portion of the district scheme to which the objection is made, to remain in the scheme.

Thus there is a clear divergence of opinion. Hutchinson, J. appears to favour analogy with the *de minimis* principle, Turner, S. M. adds to this a "more than the general public" requirement, while Luxford, S. M. clearly takes a completely different approach by adopting an analogy with the "detraction from amenities" factor in section 38A. All clearly accept that property must be affected, but to what degree is undecided. It is submitted that not only is Hutchison, J.'s approach the more authoritative, but it is also the better one. However, this is not to say that Turner, S. M. was wrong in the *Station Realty* case. Luxford, S. M. appears to be wrong. In *Evans* the suggestion that property must be materially affected was rejected as going too far. With respect, it seems that Luxford, S. M. made the same mistake as counsel for the second defendant in the *Evans* case did by adding "materially" to the word "affected"—Hutchinson, J. remarked:[39]

> . . . I am inclined to think that [counsel for the second defendant] was . . . rather stating what, in his submission, the decision of the Board would be on the merits of a case than dealing with the preliminary matter of the jurisdiction of the Board.

However, the approach of Turner, S. M. is probably no different from that of Hutchinson, J. Hutchinson, J. would not deny that the "general public" in the sense that Turner, S.M. meant it would almost always be excluded under his *de minimis* approach. By the same token Turner, S. M. would not deny that a person affected to an appreciable degree more than the general public would no doubt always escape the *de minimis* approach. Indeed, it seems Turner, S. M. was merely elaborating on the somewhat bald remarks of Hutchinson, J.

The problem recently came before the Court of Appeal in *Rogers and Others* v. *Special Town and Country Planning Appeal Board*.[40] Objections had been lodged to the proposed amendment of the Hamilton City Council's district scheme, but they were disallowed. On appeal to the Board, Dr Rogers, ex-Mayor of the city, and two others who had formerly held high office in Hamilton were found to lack standing and restricted to giving evidence in support of other appellants who did have a *locus standi*. These three then sought mandamus and an injunction in the Supreme Court to compel the

[39] [1963] N.Z.L.R. 244, at 248. In s. 22A(2) occupiers "materially affected" is the class to be posted advice concerning variation of he scheme. Could those "materially affected" then be the only ones entitled to object and appeal under s. 23(1) concerning s. 22A?

[40] [1973] 1 N.Z.L.R. 529.

Board to hear their cases. On appeal from the refusal of Woodhouse, J.[41] to grant the writ, three submissions were made. First, it was argued that the mere fact of having made an objection and had it heard by the Council gave standing to appeal under section 26(1). The Court unanimously found that the Council's agreeing to hear the appellants despite their lack of standing was a mere indulgence. Although this was wrong in strict law, the learned President expressly approved Woodhouse, J.'s comments in the Court below that[42]

> . . . the Council acted wisely and fairly when it decided that at its level the three plaintiffs should be heard.

Although he found that the Act entrusts the question of standing to the Council, Turner, P. explained at length that this did not prohibit the enquiry by superior tribunals into the Council's decision in this regard. If an objection had been made and heard by the Council as an indulgence to the objector, there is *prima facie* standing before the Board on appeal, but the Board may still refuse despite the Council's indulgence.[43]

The appellants second submission was that they were each the owner or occupier of property sufficiently affected by reason only of the fact that it was property within the city of Hamilton, and that the importance of the question to be considered by the Board was such that every property in the city must be regarded as sufficiently affected. This was disposed of by reference to Hutchinson, J. in the *Evans* case, and it was at this point that the meaning of "affected" arose. The learned President gave his unqualified approval to the interpretation of Hutchinson, J. in the *Evans* case, adding that this case has stood and been acted upon for 10 years. In doing so, he expressly rejected the remarks of Luxford, S. M. in *Tomas* v. *Rodney County Council*,[44] and also of Woodhouse, J. in the court below.[45] Wild, C. J. was of the same opinion. In approving to the Evans case he said:[46]

> In *Evans'* case Hutchinson J. stated in simple terms a test which local councils are eminently qualified to apply. So far as my researches go it has not occasioned difficulty and I do not think it calls for elaboration.

The third submission was that Dr Rogers' property for one was sufficiently affected by reason of its proximity to the area of the proposed change. It seems this question of fact was decided by Turner, P. mainly by reference to the fact that the lengthy notice of

[41] Unreported, Hamilton, 10 July 1972.
[42] See [1973] 1 N.Z.L.R. 529 at 538.
[43] Ibid., 537.
[44] Supra., n. 38.
[45] See [1973] 1 N.Z.L.R. 529 at 539.
[46] Ibid., 532.

appeal, which began with a statement of the appellants' "interests", was confined almost entirely to matters of public interest, and not to how Dr Rogers' property was affected. This led him to the conclusion that Dr Rogers' property was *not* in fact affected, and thus the final submission was disproved of.[47]

It is clear, therefore, that the *Evans* test, simply stated as that property must be affected "appreciably", is the correct one. However, it is also clear that this test is the sole test, and is to remain in its simple form without elaboration. The decision is to be left entirely to the Council as "eminently qualified" to decide in each particular case without, it seems any further guidelines.

With the greatest respect, it is submitted that this denial of the private citizen's rights in favour of an unfettered discretion in the hands of the local authorities is most unsatisfactory. That the local authorities are "eminently qualified" to decide on the fact of each case may well be so, but surely a more detailed guideline of the question of law as to what Parliament meant by "affected" is required? It is submitted that the fact that at least three different opinions have been recorded, by Luxford, S. M. and Turner, S. M., and most recently by Woodhouse, J. in the *Rogers* case, speaks for itself. Yet so the Court has decided, and it seems it is now left to Parliament to remedy the situation. It is perhaps significant that Turner, S. M.'s remarks in that *Station Realty* case[48] were not considered by the Court of Appeal in *Rogers*. His comments may well have received approval also so as to provide some acceptable elaboration, however slight, on the *Evans* test. It must be remembered, however, that Turner, S. M. was considering section 35(3) and not section 23(1). He does not expressly state that in his opinion they are the same, but for the requirement that *property* be affected in section 23(1). This seems to be implied, particularly by his use of the word "appreciable", but there is still at least some doubt.

The *Rogers* case does show two things however. First, close proximity to the *locus in quo* makes it more likely that your property is "appreciably affected". Also, an objection in the public interest, even by persons as "eminently qualified" as Dr Rogers and his co-appellants, is not covered by section 23(1), although the Council may grant an indulgence and hear such objections nevertheless. Although such indulgence would be an error of law going to the jurisdiction of the tribunal, the court will it seems exercise its discretion and refuse to quash or otherwise where there has been no real injustice caused.[49]

[47] Supra., 540.
[48] (1972) 4 N.Z.T.P.A. 190 at 192.
[49] Supra., 540-541.

(d) Section 24

Section 24 is the only provision in the Act whereby representational appeals can be made.[50] Also, it is the only opportunity available to appeal against district schemes in the ground of public interest.[51] In *Evans* v. *Gisborne City Council*[52] the appellant sought to have two others joined in the action and the appeal amended to one under section 24(1), as "persons associated" for a "purpose of public benefit or utility", namely of preserving, improving, and developing the botanical gardens and preserving their designation as such in the scheme. It was unecessary for Reid, S. M. to decide on this submission as the appellant was clearly out of time for appeal under section 24, but he nevertheless observed that "persons associated" should be read *ejusdem generis* with "every organisation or society of persons". Thus,[53]

> [i]t is very much open to question as to whether the words "persons associated" in the context of s. 24 are wide enough to embrace three persons holding similar views on the same questions of public interest.

The suggestion is that something in the nature of an organisation, society, or club formed with a wider purpose than merely to gain a right to object and appeal is envisaged by section 24. That "persons associated" must be read *ejusdem generis* with "organisation or society of persons" is, it is submitted, further supported by the absence of the former phrase in section 24(2)—"every . . . organisation or society of persons" (and not "persons associated") has the right to appeal under section 24(2).

Because the right to appeal on the grounds of public interest is not conferred on any individual under section 23, the Board has shown understandable reluctance to go beyond a strict interpretation of section 24. Thus, in *Mobil Oil (N.Z.) Ltd* v. *Christchurch City Council*[54] the appellant company was found to have insufficient standing, not being an "organisation of persons". Certainly it was an "organisation . . . engaged in . . . business", but, continued the learned Chairman,[55]

> . . . the right of objection is given not to organisations engaged in business but to organisations of persons which persons are engaged in business.

[50] *Woolf* v. *Petone Borough* (1968) 3 N.Z.T.C.P.A. 152, at 152 per Watts (Chairman); *J. B. Henderson, National President N.Z. Deerstalkers' Association Incorp.* v. *Wallace County Council* (1971) 4 N.Z.T.P.A. 150 at 151 per Stephens (Chairman). Section 30(3) gives the same rights as under s. 24 note.

[51] *Evans* v. *Town and Country Planning Appeal Board* [1963] N.Z.L.R. 244, at 248.

[52] (1962) 2 N.Z.T.C.P.A. 25.

[53] Ibid., 26.

[54] (1971) 4 N.Z.T.P.A. 161.

[55] Ibid., 162-163.

Also, the appellant's shareholders were found not to come within the meaning of "persons engaged in any profession, calling, or business". However, the basis of the decision seems to have been the respondent's contention that an individual company has only the status of a single person, by the definition of "person" in section 6 of the Acts Interpretation Act 1924. Thus, to admit the appellant under section 24(1) would be to give a company something an individual businessman does not have—the right to object on the ground of public interest.[56]

It is important concerning appeals under section 26 that the appellant must be the one who objected. Thus in *Rotorua Supermarket* v. *Rotorua City*[57] Turner, S. M. (Chairman) made the point that the objector has been the Association, and not the persons and Corporations named in the Notice of Appeal for whom the Association claimed to be agent. Also, in *Young* v. *Auckland City Council*[58] the appellant had only objected to the zoning of her own land and not her neighbour's, yet she appealed against the Council's changing her neighour's zoning at the same time as her own objection was consented to. Thus, she had no standing, and neither did the Council have jurisdiction to change the neighbour's zoning because the neighbour had not objected at all. In *Wellington City* v. *Cowie*[59] the Council had authorised a similar thing. Each member of the Court of Appeal referred to the *Young* case, but did not decide whether the Council's decision would be invalid as a result of its action. However, Richmond, J. for one was "strongly inclined" to the view that Young was correctly decided.[60]

2. Section 33A:

Appeals under this provision may arise while the district scheme is in its draft, proposed or operative stages. In *Saunders* v. *Whangarei City Council*[61] the respondent's contention was accepted that section 33A gives the right of appeal only concerning zoning, and not against certification that land is no longer required for an existing or proposed public work. Similarly, mere designation is not covered. As to the meaning of "every person who claims to be affected", the same phrase is used in section 38A(3), which will be discussed below. Also, as mentioned already, Turner, S. M. in the *Station Realty Ltd* case[62] suggests that there is no difference between claiming to be affected

[56] Supra., 163.
[57] [1972] N.Z.L.J. 71, at 94.
[58] (1960) 1 N.Z.T.C.P.A. 123.
[59] [1971] N.Z.L.R. 1089.
[60] Ibid., 1116.
[61] (1964) 2 N.Z.T.C.P.A. 175, at 176 per Kealy S.M. (Chairman).
[62] (1972) 4 N.Z.T.P.A. 190.

and being simply affected, as under section 23(1). This comparison will also be discussed below. It will suffice for the moment to point out that perhaps section 33A(3) provides a guideline to the scope of section 33A(4). It states that the Council must serve particulars of any determination under section 33A(2) on *inter alia* the "occupiers of all property in the vicinity who in the opinion of the Council may be affected by the zoning".

3. Section 34A:

Section 34(A)(4) gives the right of appeal to "[a]ny person on whom any such notice or a copy thereof is served. . . ." Under section 34A(3) "any council whose district is affected in any way may cause notice to be served on any person who is making [an objectional use of the land under section 34A(1)]". Clearly "in any way" must refer to the objectionable use. The owner of the property must also be served a copy of the notice under section 34A(3), and thus the owner and occupier have standing to appeal. Also, it seems that this provision may give rise to appeal while the scheme is in its draft, proposed, or operative stages.

4. Section 35:

Section 35(5) gives the right of appeal to "[t]he applicant and the Minister and every person, authority, or body who or that objected to the Council against the application for consent to the specified departure." By section 35(1) the applicant may be "the Minister, or any local authority, or the owner *or* occupier of the land concerned" (emphasis added). The cases concerning the meaning of "owner" have already been examined.[63] Those who have the right to object include "every person who or body that claims to be affected by the application. . . ." In *McDonald* v. *Levin* Borough[64] the objectors were found to have sufficient standing because,

> . . . as the owners and occupiers of property in the Borough, [they] have a legitimate interest in the maintenance of the traffic efficiency of State Highway No. 1 to which the land of the applicant company has frontage. . . .

The learned Chairman in *Woolf* v. *Petone Borough*[65] found the appellant to have sufficient standing in the following words:

> As a resident using the streets he may be expected to have an interest in the provision of adequate off-street parking throughout the Borough, sufficient to sustain his claim to be a person affected by the proposal. . . . The Board is satisfied, after hearing his evidence, that his claim is raised sincerely, and accordingly holds that his claim to be a person affected by the proposal gives him status of appeal before this Board.

[63] Ante, 4.
[64] (1968) 3 N.Z.T.C.P.A. 135, at 135 per Watts (Chairman).
[65] (1968) 3 N.Z.T.C.P.A. 152, at 1952.

It is submitted with respect that yet again the merits of the appeal are confused with the preliminary question of jurisdiction and *locus standi* in these two cases. This, it seems, is the only way in which the comments of Mr Watts in the *Woolf* case concerned the applicant's comparison of section 35 with sections 28C and 38A can be explained. He agreed with the submission that[66]

> . . . *prima facie*, where similar words appear in a statute they should, as a matter of law, be given the same meaning.

But he continued that the question of the applicant's standing is one of mixed law and fact and thus[67]

> . . . to give the words in question the same meaning as a matter of law, will not necessarily result in the decisions already made by the Board under the two sections previously mentioned [sc. 28C and 38A], on their own facts, being applicable to the present appeal.

This, with respect, is clearly wrong. The interpretation of "every person who or body that claims to be affected" goes to the jurisdiction of the Board, just as in the *Levin Borough* case[68] the fact that the appellant was not the "owner or occupier" of the property concerned in a specified departure application under section 35 went to the "root" of the Board's jurisdiction. The result was an error of *law* on the face of the record and a writ of certiorari issued to quash the Council's consent to the specified departure. Such matters of jurisdiction can only be questions of law, and law only.[69] For the same reason, it is clear that the fact of the Council accepting jurisdiction to hear an objection is irrelevant to whether the objector is, as a matter of law, of the required standing for the Board to have jurisdiction. In *Mobil Oil (N.Z.) Ltd* v. *Christchurch City*[70] the Board was, with respect, entirely correct in its findings that the Council cannot waive any matter so as to confer jurisdiction upon itself except where provided for by the Act. The leading case, of course, is *Rogers*—the learned President there found that the Council had not waived the appellants' lack of standing so as to confer jurisdiction upon itself, but that it had not at any stage deligerately decided the question of jurisdiction.[71] Yet in the *Woolf* case the learned Chairman, after finding the appellant to have sufficient standing, said:[72]

> In this connection it is perhaps significant that the Council heard the objection, and filed its reply to the appeal without any question being raised as to Woolf's right to do so; the question was first raised at the hearing of the appeal.

[66] Idem.
[67] Supra., 152.
[68] [1971] N.Z.L.R. 427 at 434.
[69] Keith Robinson, it seems, also takes this view: op. cit. 141.
[70] (1972) 4 N.Z.T.P.A. 161, at 163.
[71] Supra., 538.
[72] Supra., n. 65 at 152.

The more sound approach to section 35, it is submitted, is that of Turner, S. M. in the *Station Realty* case, discussed already.[73] The problem is however, the implication in the learned Chairman's remarks that sections 23(1) and 35(3) are the same but for the requirement that property be affected in section 23(1). Furthermore, in *Z. M. Patrick* v. *Auckland City Council*,[74] Turner, S. M. recorded that, in a section 35 case, if your property was *not* affected and your application or objection did not succeed on its merits, you would be liable for costs.[75] Yet section 35(3) clearly states "claims to be affected". It could simply have said "affected". Section 23(1) could easily have said "who claims that his property is affected" by the same token. It is submitted that there is and must be a difference. It was clearly stated in *Davies Properties Ltd* v. *Auckland City Council*[76] that because of the statutory obligation to conform to the provisions of an operative scheme, a proposed departure which would create a new and non-conforming use is *prima facie* contrary to the public interest. Section 35 is concerned with a *departure* from a scheme and can apply whether the scheme is proposed or operative—section 23 concerns only the proposed stage where, it seems, there is no *prima facie* rule to depart from. The statutory obligation mentioned in the *Davies Properties Ltd* case arises only upon the scheme becoming operative: section 33(1). Thus, it is submitted that the difference between section 23(1) and section 35(3) is one of degree of proof. In a section 35(3) case the objector has a *prima facie* case against him. This does not conflict with judgment of MacArthur, J. in *Straven Service Ltd* v. *Waimairi County*,[77] wherein it was clearly stated that the burden rests in he who is establishing the affirmative. The Board had regarded the onus as on the plaintiff. Thus there was an error of law on the face of the record, and certiorari issued to quash the decision. It does not conflict because this concerned the principal burden, not a mere *prima facie* burden. Second, as already mentioned, the preliminary matter of standing goes to jurisdiction and is a question of law. The burden referred to by MacArthur, J. being the principal burden, concerned what was largely a question of fact, that is, whether there was a "detrimental" work under section 38.[78] Such questions of fact would arise in the case of section 35 application when the matters outlined in section 35(2) are being considered.

[73] Ante, 5.
[74] (1971) 4 N.Z.T.P.A. 26.
[75] See also *Rogers* v. *Otahuhu Borough* (1967) 3 N.Z.T.P.A. 69, concerning s. 28C where the phrase "claims to be affected" is also to be found.
[76] (1972) 4 N.Z.T.P.A. 205, per Turner S.M. (Chairman) at 207.
[77] (1966) 2 N.Z.T.C.P.A. 414, at 318.
[78] Idem.

Therefore, it is submitted that in the case of section 35 the objector need only "claim to be affected" because of the *prima facie* burden on the applicant. This perhaps makes the *MacDonald* and *Woolf* cases a little easier to understand, and to reconcile with the *Evans* case. Also, it is in accord with the remarks of McCarthy, J. delivering the judgment of the Court of Appeal in *Lange* v. *Town and Country Planning Appeal Board (No. 2),*[79] where he related the class referred to in the enforcement provision, section 33, to that in section 35, and referred to it is an obviously wider class than that contemplated by sections 23 and 24.[80] Unfortunately the cases are lacking in any real discussion of the meaning of section 35(3) and are thus of little assistance. The reason may be that the majority are like the recent *Southern Lakes Hotel Ltd* v. *Queenstown Borough Council*[81] case. There, co-appellants Mr and Mrs A. T. Smeaton clearly had the required *locus standi* under section 35, and it would have been no different had they been appealing under section 26 from an objection under section 23(1). The proposed hotel building would cast a shadow over their nearby property which, as with much of Queenstown, was already shielded from the sun for a substantial period each year by the surrounding mountains.[82]

5. Section 38:

Under section 38(8), "[a]ny person injuriously affected by any refusal or prohibition of a Council under [section 38] may . . . appeal to the Board". In *Densem* v. *Tauranga City Council*[83] the appellant claimed standing since the council had refused to uphold his objection. The Board found he had no standing because by "refusal" in section 38(8)[84] was only meant refusal of consent to carry out any detrimental work within its district, in terms of section 38(2)—it does not cover refusal to uphold an objection. Also in *Straven Services Ltd* v. *Waimairi County*[85] the Christchurch Regional Authority was found to have insufficient standing before the Court since it was an incorporated body of persons none of whom were party to the action. However it seems that the authority would have been a "person" sufficient for the Board to have jurisdiction under section 38(8), if it were "injuriously affected" as such.[86]

[79] [1967] 7 N.Z.L.R. 898.
[80] Ibid., 909.
[81] Unreported, Queenstown, 7th August 1972.
[82] See judgment at 9190.
[83] (1964) 2 N.Z.T.C.P.A. 165.
[84] The appellant claimed under s. 38(10) which was repealed by s. 39(4) of the 1966 Amendment Act. The case still applies to s. 38(8) however.
[85] (1966) 2 N.Z.T.C.P.A. 313, at 314.
[86] See: *Silver* v. *Wellington City Council* (1962) 2 N.Z.T.C.P.A. 28 and the cases discussed post, at 123.

As to the meaning of "injuriously affected", section 38 may be compared with the "aggrieved person" requirement in the United States and England. In that case note, R. E. Megarry observed of the English position that:[87]

> The general tendency of the authorities is that a person is not "aggrieved" merely because he is dissatisfied with the decision or feels that he is dissatisfied with the decision or feels that he has been frustrated in the performance of a public duty; but if by the decision some legal or financial burden is imposed on that person, then he is "aggrieved" even if the burden is no more than the award of costs against him.

In the United States, Robert A. Hendel found that[88]

> . . . the trend is that economic factors are becoming more relevant in determining whether a party is in fact aggrieved.

The phrase "any person aggrieved" is also to be found in section 351(7) of the Municipal Corporations Act 1954. In *Free* v. *Takapuna Borough*[89] Reid, S. M. (Chairman) had this to say concerning section 351(7):

> . . . a person aggrieved must be a man who has suffered a legal grievance; a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

However, the best analogy is with section 44(1) of the Town and Country Planning Act 1953. The words of Sim, J. in *Chamberlain* v. *Minister of Public Works*[90] still seem to be authoritative:

> . . . compensation cannot be recovered under the words "injuriously affected" unless the act which caused the damage is one which would have given a right of action if it had not been authorised by Act of Parliament.

It is submitted, on the basis of these extracts, that to be "injuriously affected" under section 38(8) the refusal or prohibition of the Council must have cast some legal or financial burden on the appellant which burden would have led to a right of action had it not been authorised by Act of Parliament. Obviously the test was intended to be more narrow than that in sections 23 and 24. What about the newly inserted section 47A? Both section 47A and section 38 are concerned with a similar kind of situation. However it is submitted that, though "injuriously affected" must cover the factors in section 47A(3)(d), these factors cannot be the limit. The analogy with section 44(1) is too strong, and section 44(1) is not concerned simply with financial loss.

Finally, it must be noted that section 38 appeals can only arise under draft or proposed and not operative district schemes.

[87] Note on *Ealing Corporation* v. *Jones* [1959] 2 W.L.R. 194: (1959) 75 L.Q.R. 173.
[88] "'Aggrieved person' Requirement in Zoning" (1967) 8 W. & M.L. Rev. 294, 307.
[89] (1958) 1 N.Z.T.C.P.A. 69, at 69.
[90] [1926] N.Z.L.R. 96, at 100.

6. Section 38A:

By section 38A those who may appeal include "the appellant . . . and every person who claims to be affected by the use. . . ." The "use" by which one must claim to be affected is that referred to in section 38A(1). That is, any use that is "not of the same character as that which immediately preceded it . . . in any case where the use detracts or is likely to detract from the amenities of the neighbourhood". If it is not such a use, the Council's consent would not be required in the first place, and section 38A would have no application. It is submitted that this must have been the reasoning that led the Board, in *Titirangi Ratepayers' and Residents' Association (Inc.)* v. *Waitemata County*,[91] to treat the question whether there had been a change of use as going to the jurisdiction of the Board to hear the appeal. In this case Reid, S. M. (Chairman) accepted the respondent's contention, based in the definition of "character" in section 2(4) of the Act, that a change of use exists of the proposed use,[92] taking the amenities of the neighbourhood into consideration, differs from the existing use and would be likely to affect detrimentally those amenities.[93]

However, not only must there be such a use, but the appellant must "claim to be affected" by it. The cases in section 38A appear to decide that providing the appellant is in the neighbourhood the amenities of which are likely to be detracted from, he can claim to be affected by the use. In *Importers & Distributors (N.Z.) Ltd* v. *Te Awamutu Borough Council*[94] the respondent Council claimed the appellant's property, being three-quarters of a mile away from the property concerned in the appeal, could not be affected by the proposed use. The Board, however, found that "neighbourhood" there included the whole of the Te Awamutu Borough, and accordingly held that the appellant had the right to appeal and was a person affected under section 38A(3). In *Phillips* v. *Waimate Borough* Council,[95] at least some of the appellants had clear standing and thus the Board went ahead and considered the merits of the appeal. In doing so, "neighbourhood" was defined as that part of the residential area of Waimate lying within approximately ten chains radius of the proposed grocery and dairy, and the Board satisfied that there woud not be a detraction from the amenities of such neighbourhood. Also,

[91] (1960) 1 N.Z.T.C.P.A. 109.
[92] The use need not be proposed since the amendments to s. 38A introduced by s. 9 of the 1963 Amendment Act.
[93] Supra., 109. Note that "amenities" is defined in s. 2(1) of the Act. See Keith Robinson, op. cit., 126-127 for the problems that may arise in deciding whether there has been any change of use or not.
[94] (1964) 2 N.Z.T.C.P.A. 169.
[95] (1965) 2 N.Z.T.C.P.A. 270.

the learned Chairman then remarked that those appellants who owned and operated businesses of a similar nature in the Waimate Borough had no standing because they were outside the neighbourhood affected by the proposed use.[96]

How does this approach compare with that of Turner, S. M. in the *Station Realty case*[97] concerning section 35(3)? The inclusion of "or body" in section 35(3) clearly makes no addition to section 38A(3) because "person" includes a body of persons whether incorporated or not.[98] Also, although section 38A only concerns proposed schemes it is still aimed at preserving the *status quo*,[99] and it is submitted that, therefore, a similar *prima facie* burden rests on the applicant as under section 35.

It seems that the only way of reconciling the cases is to treat the appellants in the *Importers & Distributors* and *Phillips* cases as having been affected to an appreciable degree greater than the general public merely by being in the "neighbourhood" as defined by the Board in each case. This, it is submitted, is perfectly sound. The neighbourhood affected is that area the amenities of which are likely to be detracted from. Surely the residents in such an area should have rights to be heard where the use proposed is likely to detract from the amenities of the area? It may be argued why can section 35 not be interpreted in the same way by reference to the "immediate vicinity" in section 35(2)(a)? The answer is that, just as in the case of section 38A there must be a change of use, in section 35 the proposed use must certainly be a departure from an operative or proposed district scheme before the section can even apply. However, departure is not defined in section 35 by any reference to criteria such as in section 38A(1). The criteria in section 35(2) concern the *merits* of a departure, just as a guideline on which the *merits* of a section 38A application can be considered is provided by section 38A(2A).

Thus, it is submitted that any person can claim to be affected if he is in the neighbourhood the amenities of which are likely to be detracted from by the particular use. It is further submitted that such person need not be a landowner within that neighbourhood. All he must show is that he, in having greater access to the amenities that are likely to be detracted from, is affected to an appreciable degree more than general public. If he is a landowner he will no doubt have a better case, depending on the circumstances involved. Thus, in *Te Atatu South Businessmen's Association* v. *Waitemata*

[96] Ibid., 271.
[97] (1972) 4 N.Z.T.P.A. 190. See ante 5.
[98] *Rogers* v. *Otahuhu Borough* (1967) 3 N.Z.T.C.P.A. 69. Also, post 125.
[99] See, Keith Robinson, op. cit., 125.

County Council (No. 2)[1] the two appellants who did have sufficient standing were the owners of nearby land with shops on that might have been adversely affected by the proposed supermarket. However, the basic requirement is still that the appellant be affected to an appreciable degree greater than the general public: Turner, S. M. (Chairman) in the *Station Realty* case.[2] The cases show that, by being in the neighbourhood the amenities of which are likely to be detracted from by the proposed use, you *may* be affected to an appreciable degree greater than the general public. Thus, someone visiting his Aunt for the weekend in the neighbourhood concerned could not claim to have status to be heard concerning a use that is likely to detract from the amenities of this neighbourhood.

It has already been mentioned that it seems to be irrelevant that section 35(3) refers to "every person who or body that", while section 38A(3) only says "every person who. . . ." This is because "person" by section 6 of the Acts Interpretation Act 1924 includes a Corporation sole and also a body of persons whether corporated or incorporated. In *Silver* v. *Wellington City Council*[3] the Ngaio Progressive Association was found to be a "person" under section 38A(3), but Reid, S. M. (Chairman) could not see how the proposed use in any way affected the rights of the Association as such. Thus the Association did not have sufficient standing. The case of *J. B. Henderson, National President N.Z. Deerstalkers' Association Incorp.* v. *Wallace County Council*[4] shows more clearly the reasoning. There, the learned Chairman found the appellant Association's only claim to be affected could be as representative of its members, since the Association as such was domiciled in Wellington and owned no land that could be affected by the proposed use. This could not be allowed because the only provision for representational appeals in the Act is section 26(1) following objection under section 24(1).[5] Also in *Rotorua Supermarket* v. *Rotorua City*[6] Turner, S. M. Chairman) found that under sections 35 and 38A only those who objected can appeal. The Rotorua Progressive Businessmen's Association Incorp. had objected in its own name. Thus it could not appeal "as agent for and on behalf of the persons or Corporations whose names appear in the Schedule annexed hereto", as it purported to.[7] However, Keith Robinson criticises these cases on the ground that an Association ought not have to be affected

[1] (1964) 2 N.Z.T.C.P.A. 124. See also: *J. B. Henderson, National President N.Z. Deerstalkers' Association Incorp.* v. *Wallace County Council* (1971) 4 N.Z.T.P.A. 150.
[2] (1972) 4 N.Z.T.P.A. 190.
[3] (1962) 2 N.Z.T.C.P.A. 28.
[4] (1971) 4 N.Z.T.C.P.A. 150.
[5] Ibid., 151 per Stephens (Chairman). Section 30(3) confers the same rights of appeal as in ss. 26(1) and 24(1).

as such since, by investing it with the appropriate objects, its members are investing it with a portion of their own rights.[8] Thus the rights of the Association are the aggregate of the rights of its members, and the Board should treat the Association's rights which it claims to be affected, as being the aggregate of these rights. If the individual members could claim to be affected, why not the Association?[9] His reasoning is indeed compelling. However, the Legislature has had ample opportunity to amend section 38A and the other provisions where "person" is to be found so as to include representational appeals. The fact that it has not done so is every bit as compelling, and also the weight of authority favours the *Silver* approach.

7. Section 47A:

This provision was introduced by the 1971 Amendment Act and gives the owner of any land (or his spouse) the right to apply[10] to the Board if he (or she) is "unable to sell the land owing to it having been designated or made the subject of a requirement" (as defined in section 47A(1). If it has jurisdiction, the Board may give an order under section 47A(3). The requirements for jurisdiction are clearly set out in section 47A(2). It is to be noted that only the owner or his spouse is mentioned in section 47A. Also the provision may give rise to applications under proposed and operative, but not draft district schemes.

C. Operative District Schemes:

A district scheme becomes operative upon the Council's approval and the public notification of that approval under section 28 of the Act.[11] Those provisions of the Act that give rise to appeal under either draft or proposed as well as operative district schemes have been discussed. It remains to consider those that give rise to appeals under an operative district scheme only.

1. Section 28A:

Section 28A(2) confers the right of appeal against the Council's failure to comply with "any of the requirements of this Act or any

[6] [1972] N.Z.L.J. 71.
[7] Ibid., 94. See also: *Pahiatua Borough Council* v. *Sinclair* (1964) 2 N.Z.T.-C.P.A.; *Te Atatu South Businessmen's Association* v. *Waitemata County Council (No. 2)* (1964) 2 N.Z.T.C.P.A. 124.
[8] Op. cit., 162-163.
[9] Ibid., 163.
[10] By the definition of "appeal" in s. 2(1) such an application is technically an appeal.
[11] See the definition of "operative" in s. 2(1).

regulations thereunder" (section 28A(1)) on "the Council or any local authority which or person who at an appropriate time would be or would have been entitled to object to the scheme or section. . . ." This provision is self-explanatory.

2. Sections 28C and 28D:

Sections 28D(1) and 28D(2) confer the right to appeal on the applicant for consent to a conditional use, or any objector to the application. "Conditional use" is defined in section 2(1) and clearly the applicant has sufficient standing if he is the one who intends to conditionally use the land. The right to object is given to "[t]he Minister and every person who or body which claims to be affected by the application. . . ." Identical terms are used in section 35(3) and it is submitted that the earlier discussion on this subsection applies equally to section 28C. In *Rogers* v. *Otahuhu Borough*[12] the Board compared section 28C with section 38A and found that the inclusion of "or body which" in the former did not extend it as compared with section 38A. But, by reason of the difference already outlined[13] between sections 35 and 38A, it is submitted that the best analogy is with section 35.[14]

3. Section 30:

Section 30(3) gives the same rights to the same persons or bodies as under a proposed district scheme to object and appeal against an operative district scheme as if it were still only in its proposed stages. Such right can only be exercised if the operative district scheme "is due for review and has been continuously due for review for a period of more than one year immediately preceding that time", and so long as public notification of the review has not been made under section 22 of the Act.

4. Section 30B:

This section, from a *locus standi* point of view, is also identical to section 35. It is submitted that this analogy is best. Indeed section 30B(2) provides that applications for consent under section 30B shall be made in accordance with the regulations made under the Act relating to specified departures.

[12] (1967) 3 N.Z.T.C.P.A. 69.
[13] Esp. at 121.
[14] In *Woolf* v. *Petone Borough* (1968) 3 N.Z.T.C.P.A. 152, all three provisions were treated as being the same.

III. Conclusions

At the risk of repetition, it is appropriate to quote the words of Robert A. Hendel, concerning the "aggrieved person" requirement in the United States:[15]

> It appears that the Courts are searching for a compromise between too much judicial review and too little. The necessity for judicial review should not be considered lightly, especially when one realises the broad powers granted to zoning boards and administrators. An individual property owner must have available safeguards against any arbitrary decisions that might infringe upon the use or enjoyment of his property, or decrease its value. The "aggrieved person" requirement in zoning is just such a safeguard, and its interpretation by the Courts is of no minor importance.

Also, in *Wellington City* v. *Cowie*[16] North, P. said:

> . . . I must not lose sight of the fact that it is the business of the Court to ensure that legislation such as this does not become a weapon in the hands of a Council which enables it to ignore the rights of its own citizens.

This statement of the learned President is indeed reassuring. The problem facing the individual seeking to determine his rights is considerable. Confronted with a bewildering variety of criteria concerning *locus standi*, and a dearth of clear and useful authority on the matter, one is inclined to feel that the purported safeguards in the Act protect the Council or applicant more than the objecter whose rights are affected. It is submitted with respect that the *Rogers* case provides clear support for this sentiment.

However, perhaps the new sections 42A and 42B will assist. The Courts have in most town planning cases that have come before them made broad and constructive observations on the Act as a whole and not confined themselves solely to the particular section or subsection involved. With the new statutory right of appeal to the Administrative Division of the Supreme Court, and removal of the need for reliance on the old common law jurisdiction, it is to be hoped that the Courts will have greater opportunity to assist. Certainly assistance is required, whether it be from the Courts or Parliament, although it seems from the *Rogers* case that it might of necessity be the latter.

[15] Loc. cit., 307.
[16] [1971] N.Z.L.R. 1089, at 1093.