Central Estates (Belgravia) Ltd. v. *Woolgar* [1972] 1 W.L.R. 1048. In the lease granted by the plaintiffs to the defendants there was a covenant not to create any nuisance on the premises. Woolgar had subsequently kept a brothel on the premises, and a notice of forfeiture was duly given to the defendant in the required form. Later, due to an administrative error, a demand was made for rent, which was promptly paid. Despite the clear intention to the contrary on the plaintiff's behalf, the court showed its willingness to grant relief against forfeiture by construing the later acceptance of rent to be a waiver of the plaintiff's right to forfeit. On the question of the breach being incapable of remedy since it cast a stigma on the property, as in *Rugby School's Board of Governors* v. *Tannahill* [1935] 1 K.B. 87 and *Egerton* v. *Esplanade Hotels* [1947] 2 All. E.R. 88, the courts in the present case took a liberal approach, using a subjective test as to whether or not its discretion in granting relief against forfeiture in the defendant's favour should be exercised. As was held in *Glass* v. *Kencakes* [1964] 3 All. E.R. 807, the onus is on the landlord to prove that this stigma has caused a fall in the value of the property and in the instant case there was no evidence of this. Another factor taken into account was that the defendant was ill and aged. Accordingly the court exercised its discretion in the defendant's favour.

M. G. Menzies

PLANNING LAW

Appeal—objections—onus of proof

In *Wellington Club Inc.* v. *Wellington City* [1972] N.Z.L.R. 698 Woodhouse J. distinguished the objection procedure provided for by the Town and Country Planning Act from the usual type of procedure in which the adversary technique is used. He held that the Appeal Board in considering an objection *de novo* should be looking for solutions based on inquiry, rather than making decisions in favour of successful contestants. Therefore, there is no presumption in favour of either the policies or the announced planning or the detailed zoning or the subsequent decisions upon objection of a Council during the progress of its proposed district scheme towards the point at which it will become operative. The Board should determine the most appropriate zoning for the land without giving the policies of the administrator a procedural head start. However, Woodhouse J. held that an appeal relating to the application of a scheme after it had been made operative would involve a different procedural approach; at that stage it would be for the applicant to show that his proposal should succeed, notwithstanding the Corporation's general planning policy.

District scheme—requirements by local authority

In *Timaru City Council* v. *South Canterbury Electric Power Board* [1972] 4 N.Z.T.P.A. 213 the Council appealed against certain require-

ments which the respondent had made pursuant to s. 21(6). The main requirements to which the appellant objected were that electrical works should be a predominant use in all areas, and that they should be exempted from bulk and location requirements. The Board held that the specific inclusion of electrical works as predominant uses would eliminate the right of appeal against the siting or proposed siting of these public utilities under s. 21(9) and, since this would not be in the public interest or constitute proper planning, the appeal was allowed. Also the Board could see no reason why the respondent should be exempted from bulk and location requirements.

Objectionable elements

In *Firth Industries Ltd.* v. *Franklin County Council* [1971] 4 N.Z.T.P.A. 299 the appellant appealed to the Board under s. 34A(4) against the requirements of a notice given to it by the respondent pursuant to s. 34A(3) Town and Country Planning Act. The Board allowed the appeal, despite the fact that it found that an objectionable element did exist in the appellant's use of its land, because in the circumstances of the case the remedy sought was out of proportion to the fault found to exist.

The Board also expressed its disapproval of the form of the notice. It held that a valid notice must not leave the recipient in a position of uncertainty over material matters. It must in some way make it clear what objectionable element is alleged to exist, and the means that are to be adopted to deal with the cause.

Regional planning scheme—relationship with district planning scheme

The relationship between the Regional Planning Authority and a local planning authority was discussed in *Hutt County* v. *Wellington R.P.A.* [1972] N.Z.L.R. 916. Quilliam J. considered that the proper function of the Regional Planning Authority, as contemplated by Part I of the Act, is that it should provide a general guide for development, indicating what is desirable though leaving it to the territorial authority to plan in detail accordingly. If the territorial authority includes in its scheme any provision which conflicts with any broad recommendation of the regional scheme, the provisions of the regional scheme would predominate. However, in this case the provisions of the regional scheme did not predominate because the Regional Authority was held to have acted ultra vires by moving from a function of broad coordination to that of particular detail.

Review of appeal board decisions

In *City Construction Ltd.* v. *Auckland City Council* [1971] 4 N.Z.T.P.A. 32 the applicant sought a review of the decision of the Appeal Board under s. 42(5) Town and Country Planning Act 1953. However, the new and important evidence and/or change of circumstances which the applicant alleged in fact amounted to a new proposal.

In *City Construction Ltd.* v. *Auckland City Council* [1971] 4 for the applicant to take was to make a new application for a specified departure, and not seek a review of the prior decision.

Specified departure—powers of council

The Number One Town and Country Planning Appeal Board in *Highway Motors Ltd.* v. *Mount Wellington Borough Council* [1972] 4 N.Z.T.P.A. 220 considered for the first time since s. 35 Town and Country Planning Act 1953 was repealed and replaced (by s. 10 Town and Country Planning Amendment Act (No. 2) 1971) the principles which a Council should look to in granting or refusing to grant a specified departure application. The Board laid down two basic requirements of an applicant's case :

(i) that he should show cause why the application should be granted;

(ii) that he should demonstrate that the application comes within one or other of the limbs of subs. (2).

Subsection (2) limits the circumstances in which the discretion conferred on the Council by subs. (4) may be exercised in favour of the applicant. Nevertheless the Board held that, notwithstanding that the applicant is able to show that his application falls within the limits of subs. (2), the Board may still reject his application if he is unable to show cause why the proposed development should be allowed as an exception to the general provisions of the scheme. In the particular circumstances of the *Highway Motors'* case the appellant was held to have shown cause for the departure by establishing that the Commercial B zones in the district of the respondent (in which the car sales premises proposed by the appellant would have been a predominant use) had been fully built up and that no provision had been made for their extension.

In the *Highway Motors'* case the Board felt that if it were to grant the application, for what was in effect an extension of the adjacent Commercial B zone, the district scheme, if it were to remain an accurate document, could not remain without change. Therefore the departure application went beyond the limits of s. 35(2)(a). The Board commented at length upon the way in which para. (a) of s. 35(2) should be interpreted. A far more extensive comment on this aspect of the decision than is possible here may be found in [1972] N.Z.L.J. 349.

The question of establishing cause was also discussed by the Board in *Waitakere Land Developments Ltd.* v. *New Lynn Borough Council* [1971] 4 N.Z.T.P.A. 34. In that case the appellant submitted that a departure was warranted because there was a compelling need for the facility (a licensed motor hotel) in the area. The Board held that as to the question of need it considered itself bound by the prior determination of the Licensing Control Commission. The Board therefore refused to grant the departure because the size of the proposed development was far in excess of that which the Commission had thought necessary for that area. In spite of the fact that an applicant is able to establish a need for a proposed use, no specific departure will be permitted if that need could be met by siting the use in an area in which it is a predominant use or by the ordinary processes of zoning *(Self Serve Thrift Market Ltd.* v. *Dunedin City Council* (1971) 4 N.Z.T.P.A. 92).

Specified departure—powers of appeal board

Under s. 35(6) the Board is entitled to go beyond the principles of s. 35(2) if, on an appeal by the applicant, it considers that such a

departure is warranted in the public interest. The Board was prepared to act pursuant to this power in the *Highway Motors'* case, supra. It was held that, since the Commercial B zones of the district were fully built up and the respondent had been arbitrary and unreasonable in failing to make any provision for the extension of these zones, the public interest required that the departure should be granted, in spite of the fact that it might necessitate a change in the district scheme. The respondent argued that the application should not be granted because the area was already sufficiently served by car sales premises. However, the Board held that this consideration was not relevant with regard to the present application for it was not the duty of the respondent to act as a licensing authority for that form of commercial enterprise, nor was the departure sought out of zone on the ground of public need or convenience. However, had the applicant sought to establish cause for a departure from the provisions of the scheme by showing that there was a need for the desired use, then the question of whether or not the area was adequately serviced would no doubt have been highly relevant.

The extended jurisdiction of the Board under s. 35(1) was also discussed in *G.U.S. Properties Ltd.* v. *Timaru City Council* (1971) 4 N.Z.T.P.A. 12. In that decision the Appeal Board indicated what steps could be taken by a Council which has to reject a meritorious application because it has no jurisdiction to allow it under s. 35(2). Generally it is open to the Council:

(i) to resolve whether it will support an appeal brought to the Board and to declare the matters which in its opinion the Board should take into account under subs. (6); and

(ii) to declare what conditions should in its opinion apply, should the Board see fit grant consent to the application on appeal; and/or

(iii) to resolve to bring down such a change or variation to the scheme as would have the effect of permitting the proposal as of right.

The Board stated that it would be reluctant to authorise, by recourse to subs. (6), a proposal which is capable of being authorised and which should be authorised by a change or variation to the scheme. However, in the present case, since it was not open to the respondent to bring down a change to the operative district scheme because of the provisions of s. 29(2), the Board felt that it should in the public interest exercise its discretion under s. 35(6).

R. P. La Hood

TAXATION AND ESTATE PLANNING

Land and Income Tax Act 1954 s. 108

Section 108 avoids as against the Commissioner for income tax purposes any "contract, agreement or arrangement" made or entered