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IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M. 21/84

IN THE MATTER of the Town and Country Planning Act 1977

- a n d -

IN THE MATTER of an appeal under s.162 of the Act



BETWEEN KAWERAU BOROUGH COUNCIL

APPELLANT

A N D TARANAKI MOTORS LIMITED

RESPONDENT

Judgment: 9 July 1984

Hearing: 18 June 1984

Counsel: P.M. Salmon Q.C. and T.S. Richardson for Appellant
T.W.H. Kennedy-Grant for Respondent

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JUDGMENT OF CASEY J.

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This Case Stated arises out of a decision given by the former No. 1 Division of the Planning Tribunal on an application made by the Appellant Council under s.153 for a declaration that the use of Respondent's premises at Islington Street, Kawerau for the retail sale of certain items is not permitted under its District Scheme. It conducts a service station there and in addition it has established a "Europa Oasis" general store for the retail sale of the items specified in the application -"pre-packaged food stuffs, hardware and other items not generally associated with motoring and motor vehicles." In the Case Stated they are further described as "a variety of food stuffs, toys, books, games, footwear, indoor plants, garden tools, hardware and other products not directly related to the servicing, maintenance or fuelling of motor vehicles." For good measure, swimming pools, spa pools and associated chemicals were also sold on the site but it is accepted these are outside the permitted uses. Under the District Scheme it is zoned Light Industrial and a service

station would be a consent use, although in this particular case the Respondent's station was an existing use. The Tribunal declined the application and the Council appeals by way of Case Stated.

This Light Industrial zone is a relatively small area running along the eastern side of Islington Street and on both sides of Liverpool Street which intersects it. Just across the road on Islington Street is the Town Centre which is the principal commercial and administrative district of Kawerau. Under the heading "Service Industry" the Scheme Statement for the area includes among its objectives the provision of desirable services close to that Centre, to be of a light and non-noxious character. The Statement of Policies includes preservation of the amenity of adjoining areas, the prohibition of industries likely to create a nuisance and the encouragement of a high standard of development with an attractive appearance from the street as well as adequate off-street parking. Then follows an explanatory paragraph which clearly spells out the expected relations between the activities in the zone and the adjoining Town Centre and residential areas. "It is ideally located for industrial establishments which have close ties with the Town Centre and where there is a lot of activity generated between the two."

Moving along to the Ordinances, the Zone Statement for the Light Industrial zone says that it is to cater for service industries (including trades) which directly serve the day-to-day needs of the families in the town. Other light industries will be accommodated there which do not give rise to nuisance. The only uses are "consent uses" as follows:-

"CONSENT USES:

1. Service Industry

2. The retail sale of items associated with any industry permitted within the zone,

PROVIDED THAT:

(a) Such activity is incidental to the industry with which it is associated;

(b) The retailing is carried on adjacent to the industry with which it is associated;

(c) Adequate provision is made for the parking of vehicles associated with the retail activity."

A service industry is defined in the Scheme:-

"'Service Industry' includes such uses as builder's storage yards, household appliance repair workshops, laundries, bakeries, catering depots, service stations, repair garages, including commercial garages (but not including panel beating), spray painting, electric-plating or heavy engineering, cycle and motor cycle repair shops, lawnmower sharpening and repair workshops, steam cleaning and drycleaning depots, signwriting and signmaking, car rental firms, auction rooms, shoe repair and upholstery workshops, tradesmen's depots, recording studios, duplicating services, printing works, jewellery manufacture and any other use which in the opinion of Council falls naturally into this group, fulfills a function described in the Zone Statement and which will not detract from the amenities of the locality."

"Service station" is also defined as meaning:-

"An establishment used for the retail sale of motor spirits and lubricating oils for motor vehicles and the sale of kerosene, diesel fuel, tyres, batteries and other accessories normally associated with motor vehicles; the premises may be used for mechanical repairs and servicing,

PROVIDED THAT:

1. The repairs undertaken on the premises shall be confined to the mechanical repair of motor vehicles (other than heavy diesel fuel vehicles or engines), pleasure boat motors and domestic garden equipment, and shall exclude panel beating, spray painting, crank shaft grinding, car wrecking or any other activity likely to detract from the amenities of the surrounding area.

2. Sweets, drinks and similar goods may be sold from the premises as an incidental part of the overall operation of the service station."

As Mr Salmon points out, this is one of the very few uses within the term "service industry" which is separately defined. It is accepted that the Respondent's primary use of the land is as a service station and there is no argument over what may be sold in terms of the definition itself. The real issue is whether the expression "items associated with any industry permitted within the zone" appearing in para. 2 of the consent uses applies to service stations, so as to extend the items they are permitted to retail beyond those specified in the definition of that particular industry; and if so, whether the items specified in the application are those "associated" with that industry.

After discussing the background and the evidence, which listed a number of service stations in different parts of New Zealand selling comparable goods, the Tribunal saw its task as one of assessing whether certain goods have come to be "associated" with the industry, and found that the Council had not satisfied it beyond reasonable doubt that those complained of were not associated with service stations. It also concluded that once the retail sale of items associated with the industry is permitted, then every item associated with it (the list changing from time to time) is permitted without further consent being sought. It is apparent that in its view the determining factor was the existence of a public perception that the sale of the items in question was in fact associated with service stations, whereas the Appellants had submitted a narrower test - that there had to be some generic connection between the goods sold and the industry in question.

Mr Salmon pointed out that with most service industries the addition of the right to sell items associated with it added something that would not otherwise be normally part of the industry, whereas a service station is already a retail activity. However, in this District Scheme it is by definition a "service industry". Accordingly I do not see this fact adding to the problem, which must be determined by reference to the applicable provisions of the Scheme, having regard to the context in which they appear. They clearly support the Appellant's view of the matter. Woodhouse P.

said in delivering the judgment of the Court of Appeal in J. Rattray & Son Limited v. Christchurch City Council (C.A. 29/84; 11th April 1984):-

> "The ordinances applicable to a particular zone are simply one segment of what must be regarded as a living and coherent social document. It is certainly true that the particular ordinances will have been designed to meet particular planning objectives for the very zone, but in a practical sense their successful operation will depend upon their interaction with the intended scope and application of kindred ordinances designed to meet the purposes and objectives associated with other zones." (page 5).

If the Scheme is looked at in this way, it will be seen that a range of industrial and retail activities has been included in the definition of service station, and some of the latter have no connection with the repair and servicing of motor vehicles, which is clearly the general character of the use envisaged. It seems to follow that this list of activities is intended as an exclusive code of permitted uses for such a business on the site, and that the very general ancillary retail activities included under the consent uses for a service industry have no application. If the position were intended otherwise, it is difficult to understand why these activities have been set out in such detail. Most of them would be included in para. 2 of the consent use clause - indeed, if the Tribunal's approach were accepted, all of them would be. There is a similarity with Gardenway Nurseries Limited v. Waimairi County Council (1978) 1 NZLR 260, where a District Scheme made specific provision for the retail sale of farm product as a conditional use, when it might normally be incidental to the predominant use of farming. The Court of Appeal approved the view I took at first instance, that the latter should be read as being subject to the exclusive conditional use provision. The Court added the qualification that the Scheme must be interpreted and administered realistically, so that the de minimis principle would apply in the case of occasional non-conforming sales not affecting its integrity.

The questions for determination in the Case are:-

"(a) Was the Tribunal correct in law in determining that the Council was required to satisfy the Tribunal beyond reasonable doubt that the goods complained of were not associated with service stations.

(b) Was the Tribunal correct in law in the interpretation it gave to the phrase "items associated with any industry" as that phrase is used in the Council's operative district scheme.

(c) Was the Tribunal correct in law in determining that once the retail sale of items associated with the industry is permitted then every item associated with the industry (the list changing from time to time) is permitted without further consent being sought.

(d) Was the Tribunal correct in law in refusing to make a declaration or declarations or other appropriate orders in terms of the application."

In view of my conclusion about the proper interpretation of the Scheme, the answer to (b) must be "No". I am not quite sure how to handle question (c) because it seems to assume question (b) has been answered "yes". I think it preferable to leave it unanswered, but to indicate that no consent is necessary for changing items within the categories of goods mentioned in the definition of "service station" as those which can be lawfully sold in terms of the Ordinance.

In the light of my decision on (b), I agree with Mr Salmon that the question (a) about the onus and standard of proof is no longer relevant and does not require an answer. Counsel spent some time in submissions on this point. On the Tribunal's view, it was necessary to decide as a question of fact whether retail sale of the specified goods had become associated with service stations, and it held the onus was on the Appellant to show beyond reasonable doubt that they had not. It took this approach because of its view that any decision on this application would be binding in the event of a prosecution, in which the higher standard of proof would be needed to establish a use not in conformity with the Scheme. With respect, I do not think such a decision would necessarily have that effect in a criminal prosecution. After some

uncertainty about whether principles of issue estoppel apply in criminal cases in New Zealand, the Court of Appeal appears to have clarified the situation in Bryant v. Collector of Customs (C.A. 258/83; 18th May 1984). In a case involving an issue which has been decided in other proceedings between the same parties, or in a collateral attack on the earlier decision, the proper approach is now seen to lie in the exercise by the Court of its discretion to prevent an abuse of its procedure by attempts to re-litigate the matter, if the interests of justice require that course. Accordingly, there seems to be no justification for taking an approach under s.153 different from that which has always prevailed in civil litigation, where the standard of proof is on the balance of probability, paying due regard to the gravity of the matter where the conduct under scrutiny could amount to an offence.

Counsel also drew my attention to the wording of s.153 which might suggest that the Tribunal should not make a negative declaration, although I think that its terms are broad enough to allow this. While the Appellant sought a declaration in negative terms, I think it desirable to follow the wording of the section and ask whether the use is a permitted use. In Papatoetoe City Council v. I.H. Wedding & Sons Ltd. the former No. 4 Division of the Planning Tribunal refused to make a negative declaration in respect of an existing non-conforming use, which would amount to a finding that it was unlawful. One can see the reason for that refusal in the case of an existing use, which depends on the factual situation being established as well as on the interpretation of the Scheme. In general, it may be a desirable practice to confine any declarations in this way within the positive language of s.153, either by stating that a use is permitted, or declining to make the declaration sought. This would yield a practical solution to the difficulty felt by the Tribunal about the impact of a negative declaration on a subsequent prosecution, while still leaving the way open to the Council to prosecute for a non-conforming use if no such finding were made. As I have taken a different view over the interpretation of the Scheme, the last question must now be answered "No", and the

matter is referred back to the Tribunal for further consideration in the light of this judgment.

The Appellant is entitled to costs which I fix at $750 plus any disbursements.

Solicitors:

Osborne Handley Gray & Richardson, Whakatane, for Appellant
Simpson Grierson, Auckland, for Respondent