19/7

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

M. 7/84

No Special Consideration

803

IN THE MATTER of the Town and Country Planning Act 1977

- a n d -

IN THE MATTER of an appeal pursuant to Section 162 of the Act

BETWEEN MOUNT WELLINGTON BOROUGH COUNCIL

APPELLANT

A N D A.W. BRYANT LIMITED

FIRST RESPONDENT

A N D ELLERSLIE BOROUGH COUNCIL, AUCKLAND REGIONAL AUTHORITY and MACE CONSTRUCTION LIMITED

SECOND RESPONDENTS

Judgment: 2.7.84

Hearing: 22 June 1984

Counsel: L.J. Newhook for Appellant
R.W. Worth for First Respondent and Ellerslie Borough Council
R.L. Towner for Mace Construction Limited

JUDGMENT OF CASEY J.

This appeal by way of Case Stated involves a very narrow point. A.W. Bryant Limited applied for planning consent to establish a refuse transfer station for commercial and industrial waste on a large site zoned Industrial C. This activity was not mentioned in the ordinances as a permitted use; indeed, as the Planning Tribunal remarked, this use is a very recent development in human activity and for planning purposes it would not be frequently encountered. It is undoubtedly an industrial use. The Appellant Council had refused consent, its Planning Committee finding that it was contrary to the public interest and it was not convinced there would be little planning significance beyond the immediate

vicinity, because of the increase of traffic movement to residential areas. On appeal, the Tribunal gave an interim decision on 14th July 1983 granting the application subject to conditions which were fixed in a final decision of 21st December that year.

Although it felt that refuse transfer stations might be a conditional use under the "catch-all" provision at the end of the appendices of industrial uses to the Code of Ordinances, the Tribunal preferred not to place reliance on that and acknowledged that it was a departure from the Scheme, coming within the limitations imposed by s.74(2)(a). However, instead of moving directly to consider the criteria under that section, it made an oblique approach, based on its finding that the proposal had the same town planning character as the uses mentioned in appendix 13, so that if it had been specifically provided for in the District Scheme, that would have been the appropriate place. It thought the application should be treated as if the use were specifically provided for as a conditional use in the Industrial C zone and as a predominant use in the Industrial D zone. It then moved on to consider s.72(2) and 3(1), being the provisions applicable to such uses, the principal concern being suitability of the site. Then followed a discussion of the appropriate matters one would expect to be taken into account on an application for consent to a conditional use, ending with the conclusion that it should be granted. The Tribunal expressed itself in this way:-

> "But the use is not specifically provided for in the district scheme and therefore the company's proposal is a departure therefrom. Given that it is not specifically provided for in the district scheme, given that if it were it would be a conditional use in this zone, and given our conclusion that as a conditional use it would be entitled to consent, the proposal comes within the limitations imposed by section 74(2)(a) and is entitled to consent under that section." (page 9).

The Case Stated accepts that the proposal would be a specified departure in the Industrial C zone, and the questions of law for determination are as follows:-

"(a) Was the Tribunal correct in law in holding that the appropriate town planning basis upon which to evaluate the second respondent's application for planning consent was as if the use were specifically provided for as a conditional use in the Industrial C zone and as a predominant use in the Industrial D zone?

(b) Given that the use is not specifically provided for in the district scheme, given that if it were it would be a conditional use in the Industrial C zone and given the conclusion that as a conditional use it would be entitled to consent, was the Tribunal correct in law in holding that the proposal comes within the limitations imposed by section 74(2)(a)?"

I was referred to the decision of Jeffries J. in Tauranga County Council v. Ogier 9 NZTPA 469 where very much the same problem arose. In that case the respondent had applied for consent to establish a mussel farm in the Harbour B zone under a District Scheme in which the Scheme Statement clearly indicated there should be a moratorium on marine farming there, and no provision was made in the Code of Ordinances for such a use. However, in another part of the Scheme Statement shell fish farming was included as a conditional use. This was explained by the Council at the hearing as being a mistake and it treated the application as being one for a specified departure and refused it. The Planning Tribunal held that the plain words in the Scheme Statement on which the applicants relied could not be ignored and regarded it as an application for consent to a conditional use.

It is clear from the questions in the Case Stated there that a similar issue was involved - namely, that where the use proposed is not a conditional use, should the application be judged by taking into account conditional use criteria? At p.475 Jeffries J. stated the obvious, "that conditional uses and specified departures in operative schemes are quite different planning animals, with very different statutory considerations governing the consent or refusal of planning permission for each." Later in his judgment he referred to Tucker v. Whangarei County Council & Baptist Union in New Zealand (decision 21/79 of the No.1 Division of the

Planning Tribunal; 17th September 1979), and agreed with Counsel's submission that the Tribunal's use of a similar approach there was wrong in law. Mr Newhook provided me with a copy; the Tribunal was dealing with an appeal relating to a youth camp which was not a permitted use in the zone, but camping grounds were. The Council had dealt with it as an application for the latter, and granted consent, but the Tribunal held this was wrong. Acknowledging that youth camps as such were not provided for in the Scheme, it considered that the proposal was very similar to the permitted use for educational and residential institutions, although not precisely the same. It held that the application "should be considered in the light of the matters in s.72(2) as if it were a conditional use; and that if having regard to those matters it would be proper to grant consent, then subject to the requirements of s.74 itself, consent should be given under s.74." Later in the decision it said that variations it had made to the conditions of consent imposed by the Council brought the matter within the limitations imposed by s.74(2)(a).

In the light of these qualifications I would think, with respect to Jeffries J., that the Tribunal had made it sufficiently clear it had in mind the criteria in the latter section and had applied them to the application, notwithstanding the attention given to s.72(2). Unfortunately, I regret that the same conclusion cannot be reached in the decision now under review. It may be that the Tribunal intended to use the conditional use references as a convenient form of shorthand to express its satisfaction with the requirements set out in s.74(2)(a). But notwithstanding the earlier expression of intention to treat the application as a departure, the words I have quoted from its conclusion at p.9 of the decision make me quite uncertain whether its attention was properly directed towards those criteria. In effect, it seems to have decided that because the proposal should be regarded as a permitted use, then the requirements of s.74(2)(a) could be automatically taken as being satisfied. However, as Jeffries J. pointed out so clearly in the Tauranga County Council case, the two provisions are separate and if an application cannot be brought within s.72, then it must be

considered under s.74. The logic of this seems inescapable.

I have carefully studied both the interim and final decisions in the light of Counsel's submissions to try and ascertain whether the Tribunal's findings and comments on the evidence (which occupied a large part of the former) amounted in reality to findings that the conditions of s.74(2)(a) had been complied with. So far as they go, there would be room for such a conclusion, but my problem is that I do not know the full extent of the evidence or the submissions which were made to the Tribunal. Accordingly, there is no room for me to exercise a discretion to confirm the decision notwithstanding the answers to the questions in the Case. Both of them must be "No", and the decision is set aside and the matter referred back to the Tribunal for further consideration in the light of this judgment. Presumably it has all the appropriate evidence and submissions and can reach a decision without a further hearing.

Counsel for Mace Construction Limited (one of the objectors) obtained leave to withdraw and took no part in the hearing; nor did the Auckland Regional Authority which intimated it would abide by the Court's decision. The Ellerslie Borough Council supported the Mount Wellington Borough Council. I will hear Counsel on the question of costs if necessary, and they are accordingly reserved.

McCarey J.

Solicitors:

Towle & Cooper, Auckland, for Appellant
Butler White & Hanna, Auckland, for First Respondent and Ellerslie Borough Council
Russell McVeagh McKenzie Bartleet & Co., Auckland, for Mace Construction Limited